FILED
AUG 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN TOBACCO COMPANY, TOBACCO WORKERS' INTERNATIONAL UNION, AND LOCAL 182 OF TOBACCO WORKERS' INTERNATIONAL UNION,

Petitioners,

v.

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR,

Respondents.

AMERICAN BRANDS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

(Names and addresses of attorneys on inside cover)

Petition For Certiorari Filed January 15, 1981
Certiorari Granted June 15, 1981

HENRY T. WICKHAM *(Counsel of Record for American)*
STEPHEN A. NORTHUP
MAYS, VALENTINE, DAVENPORT & MOORE
P. O. Box 1122
Richmond, Virginia 23208
804-644-6011

PAUL G. PENNOYER, JR.
BERNARD W. MCCARTHY
PETER N. HILLMAN
MARY T. YELENICK
CHADBOURNE, PARKE, WHITESIDE & WOLFF
30 Rockefeller Plaza
New York, New York 10112
212-541-5800
Counsel for Petitioners The American Tobacco Company, a Division of American Brands, Inc., and American Brands, Inc.

HENRY KAISER
RONALD ROSENBERG *(Counsel of Record for the Unions)*
VAN ARKEL, KAISER AND ROSENBERG
1828 L Street, N.W., Suite 701
Washington, D.C. 20036
202-466-8400

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
BREDHOFF, GOTTESMAN, COHEN, CHANIN, WEINBERG & PETRAMALO
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
202-833-9340

LAURENCE GOLD
AFL-CIO
815 16th Street, N.W.
Washington, D.C. 20006

JAY J. LEVIT
Imperial Building, Third Floor
5th and Franklin Streets
Richmond, Virginia 23219
804-644-5453
Counsel for Petitioner Unions

JACK GREENBERG
JAMES M. NABRIT, III
PATRICK O. PATTERSON
Counsel of Record for Patterson Respondents
BILL LANN LEE
Suite 2030
10 Columbus Circle
New York, New York 10019
212-586-8397

HENRY L. MARSH, III
JOHN W. SCOTT, JR.
RANDALL G. JOHNSON
HILL, TUCKER & MARSH
P. O. Box 27363
Richmond, Virginia 23261
Counsel for Respondents John Patterson, et al.

CONSTANCE L. DUPRE
Acting General Counsel
PHILIP B. SKLOVER
Acting Associate General Counsel
VELLA M. FINK
Assistant General Counsel
WILLIAM H. NG
Attorney
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
202-633-2217

TABLE OF CONTENTS

Page

1. Chronological List of Important Dates on Which Opinions and Orders Were Filed ..... App. 1

2. Post-Trial Opinion of the District Court on Liability (8 Fair Empl. Prac. Cases 778) ..... App. 2

3. Opinion of the District Court on Relief and Decree (11 Fair Empl. Prac. Cases 577) ..... App. 50

4. Opinion of the Court of Appeals on Initial Appeal (*"Patterson I"*) (535 F.2d 257) ..... App. 70

5. Order of the Supreme Court Denying Petitions for Certiorari (429 U.S. 920) ..... App. 108

6. Order of the District Court Denying Motions to Reconsider and Vacate Prior Findings of Liability (18 Fair Empl. Prac. Cases 377) ..... App. 109

7. Panel Opinion of the Court of Appeals on Appeal from Denial of Motion to Reconsider and Vacate Prior Findings of Liability (*"Patterson II"*) (586 F.2d 300) App. 112

8. *En Banc* Opinion of the Court of Appeals on Appeal from Denial of Motion to Reconsider and Vacate Prior Findings of Liability (*"Patterson III"*) (634 F.2d 744) App. 135

CHRONOLOGICAL LIST OF IMPORTANT DATES ON WHICH OPINIONS AND ORDERS WERE FILED

September 26, 1974	District Court enters post-trial opinion on liability
December 31, 1974	District Court enters opinion on relief and decree
February 23, 1976	Court of Appeals files opinion in *Patterson I*
November 1, 1976	Supreme Court files order denying petitions for writs of certiorari to review *Patterson I*
December 23, 1977	District Court enters order denying motions to reconsider and vacate prior findings of liability
October 23, 1978	Court of Appeals files opinion in *Patterson II*
November 18, 1980	Court of Appeals files opinion in *Patterson III*
January 15, 1981	Petition for writ of certiorari to review *Patterson III* filed
June 15, 1981	Petition for writ of certiorari granted granted

App. 2

Post-Trial Opinion of the District Court on Liability

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 101-73-R

John Patterson, et al.,

Plaintiffs,

v.

The American Tobacco Co., et al.,

Defendants.

Civil Action No. 104-73-R

Equal Employment Opportunity Commission,

Plaintiff,

v.

American Brands, Inc., et al.,

Defendants.

MEMORANDUM OPINION
Entered September 26, 1974

These actions, consolidated for trial, involve alleged sex and race discrimination in two plants and an administrative office of The American Tobacco Company (American) in Richmond, Virginia. Civil Action No. 101-73-R (Patterson) is brought pursuant to 42 U.S.C. § 1981 and Title

VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.)[1] as a private class action[2] seeking affirmative injunctive relief and back pay on the basis of past and continuing racial discrimination in employment practices, particularly with regard to seniority and job assignments resulting from the seniority.[3] Civil Action No. 104-73-R (EEOC) is also a Title VII action, but was brought by the Equal Employment Opportunity Commission (EEOC) pursuant to 42 U.S.C. § 2000e-5(f)(1). It contains allegations similar to those in Patterson with regard to employment practices and in addition alleges discrimination in hiring on the basis of race and sex discrimination. The Tobacco Workers' International Union (the International), a defendant in the Patterson action, is not named in the EEOC action. Local No. 182 of the International (the Local) is named a defendant in both actions.

---

[1] The Patterson action was originally brought only pursuant to 42 U.S.C. § 1981. Following receipt of a Notice of Right to Sue from the EEOC to certain named plaintiffs, the action, on March 12, 1973, was amended to include an allegation of violation of Title VII.

[2] The class has been defined as follows:

(1) All black persons, whether currently employed or retired, who were employees of the defendant company on or after July 2, 1964; and

(2) All black persons, whether currently employed or retired, who were employees of the defendant company on or after July 2, 1965, who were performing duties in jobs, the compensation for which was less than that for similarly situated white employees.

[3] On May 10, 1974, on plaintiffs' motion, an order was entered striking from the Amended Complaint in Patterson all allegations pertaining to discrimination in hiring on the basis of race. Since the trial of the case the plaintiffs in Patterson have filed, pursuant to Fed. R. Civ. P. 15(b), a motion to amend the complaint to conform to evidence introduced at the trial on the subject of hiring on the basis of race. That subject *was* included in the complaint by the EEOC at the time of trial. Consequently, the subject, even without the amendment sought by the Patterson plaintiffs, will be considered in this opinion.

Post-Trial Opinion of the District Court on Liability

The case was tried to the Court beginning July 15, 1974, limited to the issues of liability for back pay and injunctive relief. The issues as to the amount, method of calculation, and distribution of any back pay award are to be considered after resolution of the issues of liability and injunctive relief. The last of the post trial briefs was received on or about August 15, 1974.

For a more complete description of the parties and certain other facts, reference is made to Stipulation Number I, attached as Appendix I, which the Court adopts as part of its findings of fact.[4]

During and after trial, defendants renewed motions previously made for dismissal and summary judgment. These will be considered before reaching the merits of plaintiffs' allegations:

A. *The EEOC Action Was Not Timely Filed.*

This issue has now been decided, adversely to defendants, by EEOC v. Cleveland Mills Co., Civil No. 73-2298 (4th Cir., August 19, 1974).

B. *The Right Of EEOC To Sue Terminates Upon The Filing Of Patterson And Vice Versa.*

The "problem of duplicitous actions" referred to in *Cleveland Mills* is really no problem here. In the first place, when the Patterson suit was originally filed, on March 2, 1973, it was not a Title VII action; it did not become one until March 12, 1973. The EEOC action was filed on March 5, 1973. Second, there are significant differences, as heretofore set forth, between the actions, the only duplication

[4] Counsel for the defendant unions did not agree to Paragraphs 9, 10, 50 and 56 of the Stipulation; however, the Court finds that the statements of fact contained in those paragraphs are correct.

being on the issue of discrimination in promotional opportunities on the basis of race. Third, even if it were concluded that the plaintiffs in Patterson, instead of amending their complaint, should have intervened on this issue in the EEOC action, dismissal of either action would not be warranted. Here the consolidation of the actions has accomplished what intervention would have.

C. *The EEOC Has No Standing To Represent Females.*

American's position on standing, in essence, is that EEOC can only have that standing which the charging party, in this case Jenkins, would have had if he had brought a private action. Jenkins, a male, filed a charge with the EEOC alleging discrimination against males because of sex. EEOC in its complaint here charges discrimination against females because of sex. American says that because Jenkins could not bring a private action based on discrimination against females, neither can the EEOC. The Court does not agree. Such restriction on the adjudication of all the aspects of an issue such as sex discrimination runs counter to the liberal construction to which Title VII is entitled. This case is distinguishable from the cases which hold that where the charging party alleged only race discrimination before the EEOC, the EEOC cannot file a complaint alleging sex discrimination, although there is language in some of those cases which supports defendants' position.[5] It would be inconsistent with the remedial aims of Title VII to hold that once the tissue of sex discrimination had been presented to the Commission, the Commis-

[5] *EEOC* v. *New York Times Broadcasting Services, Inc.*, 364 F. Supp. 651 (W. D. Tenn. 1973); *King* v *Georgia Power Co.*, 295 F. Supp. 943 (N. D. Ga. 1968); *EEOC* v. *W. Elec. Co.*, Civil No. 73-448-N (D. Md., August 15, 1974). Contra: *Latino* v. *Rainbo Bakers, Inc.*, 358 F. Supp. 870 (D. Cal. 1975).

sion could only investigate discrimination against persons of the same gender as the person who made the charge. A proper investigation of that issue would almost necessarily involve inquiry into whether either sex was being discriminated against. Discovery of such discrimination without the ability to seek to alleviate it in accordance with 42 U.S.C. § 2000e-5(f)(1) would subvert the purpose of that provision. Certainly discrimination against both sexes was within "the scope of the EEOC investigation which can be reasonably expected to grow out of the charge of discrimination." *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970).

D. *All Claims Are Barred By The Virginia Statute of Limitations, Va. Code Ann. § 8-24.*

The cited Virginia statute does not mention 42 U.S.C. § 1981. It does mention 42 U.S.C. § 1983. Actions under the latter, according to the Virginia statute, must be brought within one year. Actions for back pay, such as the instant one, would clearly survive, and were this action solely for redress under § 1981, damages for back pay accruing prior to five years before the action was filed might not be recoverable. Under 42 U.S.C. § 2000e-5(g), however, back pay is allowable as an affirmative action if found appropriate to correct an unlawful employment practice. The liability for back pay under Title VII is limited to a period beginning two years prior to the filing of a charge with the Commission. 42 U.S.C. § 2000e-5(g). The charges were filed by the named plaintiffs in Patterson in January and February of 1969. The charge with respect to sex discrimination was filed with the EEOC on April 8, 1969. Although back pay would not be allowable earlier

than two years prior to those dates, it would be allowed, if appropriate, from that date forward.

If, as alleged, the violations are continuing in nature, there would be no statutory limitation bar to injunctive relief.

E. *The EEOC Action Should Be Dismissed As To The Local Union For Failure To Give The Union The Opportunity To Conciliate.*

Under the circumstances of this case, failure to offer formally the union an opportunity to conciliate prior to the filing of the law action, while perhaps technically a defect, is not a basis for dismissal of the action as to the union. On July 9, 1973, an offer to conciliate was formally made, *and accepted* on July 12, 1973 by the union. While unsuccessful, the efforts at conciliation were sufficient to meet the requirements of the act and to constitute substantial compliance therewith.

F. *None Of The Violations Is Of A Continuing Nature.*

As hereafter pointed out, while the present system of posting and bidding, employed by American since 1968, is facially fair and neutral, past acts of discrimination have resulted in present disparity of pay, present segregated job classifications and present promotional systems based on race and sex. These constitute, in the Court's view, continuing violations of Title VII.

* * *

The Court makes the findings of fact attached hereto as Appendix II, many of which as counsel will recognize, are adopted from portions of the proposed findings of fact submitted by the parties.

Post-Trial Opinion of the District Court on Liability

The facts listed are found with the full realization that statistics are often misleading; that certain of the plaintiffs' exhibits containing statistics do not support the conclusions attempted to be drawn from them by the plaintiffs; that the same is true for the defendants and some of their exhibits; and that on an individual basis some of the exhibits are in fact incorrect. The inference which the Court draws from the statistics overall, however, is that, except for the non-supervisory employees in the Richmond Office, there was and is disparate income by race and sex, segregated job classifications by race and sex, and promotional systems based on race and sex. Neither the statistics nor the other evidence of the plaintiffs warrant such an inference with regard to non-supervisory employees at the Richmond Office; however, supervisory positions at all three facilities have been practically closed to blacks and females until very recently.

The omission of any finding with regard to whether a particular job classification is under-evaluated is deliberate. Aside from the fact that the experts on both sides and their respective graphs (Pl's Ex. 48 and Deft's Ex. VB-22) were not particularly persuasive, the Court seriously questions the propriety of its determining whether a particular job is underevaluated or underpaid in actions such as these.

Likewise the failure to make any findings with regard to the filling of temporary vacancies is purposeful. The manner of filling such vacancies is complicated, and the present effect of past or present practices in that regard is too speculative to warrant the Court's making any finding that those practices have resulted in discrimination on account of race or sex.

The present system of posting and bidding adopted in 1968 is fair, although it needs, in the Court's view, further

implementation. As indicated in the findings of fact, however, black and female employees in the Richmond Branch and the Virginia Branch have been locked in their jobs as a result of prior discriminatory practices. This is because of the static condition of the tobacco industry generally, and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring.

Even without specific proof of overt or particular acts of discrimination,[6] the statistical evidence is more than sufficient to establish a *prima facie* case of discrimination for the two branches. Under now familiar principles, the burden of rebutting such a case or of showing that the discrimination is caused by business necessity accordingly shifts to the defendants. *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972). The defendants have failed to carry this burden. American takes the position that there is no discrimination and hence, with few exceptions, does not undertake to show any business necessity. Their statistics, their testimony that better jobs were available to the blacks and females who wanted them, and their evidence of efforts to eliminate any discrimination at the two branches are unpersuasive. The situation with regard to supervisory positions at all three facilities is particularly deplorable.

Hiring

The same cannot be said of hiring, however, except to the extent that discrimination in the selection of supervisory personnel can be considered discrimination in hiring

[6] Even if the named plaintiffs cannot show individual injury from discrimination, this, of course, does not deprive of a remedy the class of employees which the named plaintiffs represent. *Parham* v. *S. W. Bell Tel. Co.*, 433 F. 2d 421, 428 (8th Cir. 1970).

(and the Court does not so consider it, since such a substantial portion of the supervisory personnel is selected from the hourly-paid workers). In the Court's view, not only do the plaintiffs' statistics and other evidence not warrant an inference of discrimination insofar as hiring is concerned, but the statistics offered by the defendants and their evidence of affirmative efforts with regard to hiring rebut any *prima facie* showing made by the plaintiffs in this regard.[7]

Crafts

Nor are the plaintiffs entitled to relief with respect to the craft positions. The statistics reveal an unfortunate situation, to say the least, in craft positions for both blacks and females. The defendants' evidence, however, convinces the Court that, quite aside from any mechanical difficulty arising from the absence of the craft unions as parties, the absence of blacks and females is not the result of discrimination by American. Among the factors leading the Court to this finding are the relatively small number of craft positions existing in the plants, the small turnover in those positions, the scarcity of qualified craftsmen in the Richmond SMSA, the fact that recruiting for qualified persons has been conducted in a non-discriminatory way, and the efforts that have in fact been made to recruit blacks for those positions.

Union Involvement

Both the Local and the International disclaim any involvement in creating or fostering impermissible conditions

[7] This resolution of the hiring issue makes it unnecessary to decide the Patterson plaintiffs' motion to amend, discussed in Paragraph 2, *supra*. The Court's finding would be the same, however, even were the motion granted.

at American. Although wages are paid only by American, the local has been active in the fixing of wages, working conditions, and factors to be considered for promotions. Consequently it is "responsible," even if not solely, within the meaning of 42 U.S.C. § 2000e-5(g) for the unlawful employment practices. Moreover, the mandatory injunctive relief the Court intends to grant, involving possible changes in employee job positions and seniority contrary to terms of the existing contract between American and the union, requires that the Local be bound by any decree entered in the actions.

The International's disclaimer of involvement is refuted by the terms of the constitution of the Local which recites, in pertinent part:

> "...no collective bargaining and working agreements shall be consummated until first submitted to the General President [of the International] who may...approve or reject any proposed agreement and no such agreement can be executed without the approval of the General President...."

Plaintiffs' Ex. 53.

By its terms that Constitution constitutes a contract between the Local and the International unions. It, too, is responsible for the unlawful employment practices.

* * *

The Court concludes from the attached Stipulation and findings of fact and the foregoing that plaintiffs are entitled to the following relief:

A. An award of back pay, in favor of the hourly-paid blacks at the Richmond Branch and the Virginia Branch who are members of the class, as defined, and who have not "opted out," against American and the unions.

B. An award of back pay, in favor of the hourly-paid females in the Virginia Branch and the Richmond Branch, whether currently employed or retired, who were employees of American on or after July 2, 1965. and who were performing duties in jobs, the compensation for which was less than that for similarly situated male employees, against American and the unions.

C. An adjustment to the pension and profit-sharing plans to compensate for the effects of past discrimination.

D. An award of costs, including attorneys' fees to counsel for the plaintiff in Patterson.

E. An injunction providing:

1. A company-wide (i.e., Richmond Branch and Virginia Branch) seniority system for employees other than supervisory personnel.

2. An immediate company-wide posting and bidding on each non-supervisory job in the Richmond Branch and Virginia Branch, with no qualification except seniority and a willingness to learn the job; provided, that as to the jobs of adjuster, overhaul adjuster, and adjuster-prefabrication, the qualifications listed in finding 31 shall also be required. The existing posting and bidding procedure shall be followed; but in addition there shall be promulgated and posted a job description of each job classification posted. A reasonable time will be allowed to accomplish the foregoing. In the event, after that reasonable time, class members or females are found to have displaced an incumbent employee who has had to move to a job having a lower classification, such employee will have his or her wages "red-circled" until the wage level for the job he or she holds reaches the level at which he or she is being paid.

3. Insofar as supervisory personnel are concerned, in the Richmond Office, Richmond Branch and Virginia Branch, no vacancies therein shall be filled with other than females and blacks until the percentages of females and blacks in supervisory positions approximates the percentages of females and blacks in the total work force in the Richmond SMSA.

4. A written job description for supervisory jobs which will include, but should not be limited to, objective criteria for selection for or promotion to a supervisory position.

* * *

In formulating the above relief, the Court does not intend to mandate the awarding of a job to a person who is not qualified for it. Following a reasonable time, if an employee, whether supervisory, clerical, or factory worker, is unable to competently perform the job, he or she need not be retained in that job. This decision is to remain the employer's, and will not be disturbed absent a showing of discrimination.

The "bumping," which can occur under the relief awarded, will undoubtedly create morale problems, if not immediate economic problems, for those displaced. The relief is warranted, however, where past discrimination has allowed those persons greater job opportunity than more senior blacks and females.

The formulation of the method of calculation and distribution of the back pay award and adjustment to the pension and profit-sharing plans will be complex—sufficiently so as to tax the ingenuity and good faith of counsel. In this regard counsel are directed to confer with a view to agreeing on a plan of calculation and distribution of the back pay award for submission to the Court—and, indeed, to

explore the possibility of settling the monetary aspects of the case.

A decree should be prepared embodying, in more detail, the injunctive relief awarded, and providing for a method of calculation and distribution of the back pay award as well as adjustments to the pension and profit-sharing plans. If the latter cannot be agreed upon after thirty (30) days, counsel should notify the Court and a hearing will be scheduled. If the form of the decree, insofar as injunctive relief is concerned, cannot be agreed upon within a reasonable time, counsel should also notify the Court, and a hearing on that, perhaps combined with the other hearing, may be scheduled.

/s/ G. V. B., J.
United States District Judge

Alexandria, Virginia
September 25th, 1974.

Post-Trial Opinion of the District Court on Liability

APPENDIX I

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 101-73-R

John Patterson, Marion Moshoe, Edmund Page, James Randolph, Percy Taylor, each individually and on behalf of all other persons similarly situated,

Plaintiffs,

v.

The American Tobacco Company, a Division of American Brands, Inc., a corporation; Tobacco Workers' International Union, an unincorporated association; Local 182, Tobacco Workers International Union, an unincorporated association,

Defendants,

and

Civil Action No. 104-73-R

Equal Employment Opportunity Commission,

Plaintiffs,

v.

The American Brands, Inc., d/b/a The American Tobacco Company; and Local 182, Tobacco Workers' International Union (AFL-CIO),

Defendants.

Post-Trial Opinion of the District Court on Liability

STIPULATION NUMBER I

The plaintiffs, John Patterson, et al., and the Equal Employment Opportunity Commission, and, the defendants, The American Tobacco Company, Local 182, Tobacco Workers' International Union, and the Tobacco Workers' International Union, do hereby stipulate and agree, subject to objection by any party as to the relevancy, competency, and materiality, of any statement contained herein and without in any way abridging the right of any party hereto to introduce additional evidence relating to any of the matters herein, as follows:

1. The defendant The American Tobacco Company, a division of American Brands, Inc., (hereinafter Company) is a corporation organized and existing under the laws of the State of New Jersey.

2. The defendant Company is an employer in an industry affecting commerce within the meaning of § 701(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b).

3. The defendant Company owns and operates the Virginia Branch for the purpose of manufacturing cigarettes in Richmond, Virginia.

4. The defendant Company owns and operates the Richmond Branch for the purpose of manufacturing smoking (pipe) tobacco in Richmond, Virginia.

5. Although the Virginia Branch and the Richmond Branch are under separate plant management, the defendant Company has on two occasions, the last occasion being between the years 1957-1959, permanently transferred employees from one Branch to the other.

6. An office staff which performs various accounting and record keeping duties for both the Richmond and Vir-

ginia Branches, is physically located at the Virginia Branch, and is designated as the Richmond Office.

7. The Shipping Department at the Virginia Branch ships the products of the Virginia and Richmond Branches.

8. The defendant Company does not maintain any written job descriptions for any of its job classifications at the Richmond and Virginia Branches.

9. Local No. 666 of The International Brotherhood of Electrical Workers (I.B.E.W.) has jurisdiction over the job classifications of electrician and electrician's helper at the Richmond and Virginia Branches of the defendant Company.

10. Richmond Lodge No. 10 of The International Association of Machinists and Aerospace Workers' (I.A.M.A.W.) has jurisdiction over the job classifications of machinists, machinist apprentice, welder, carpenter-millwright, brick or cement work, pipefitters, adjuster—prefabrication (Virginia Branch), adjuster helper—prefabrication (Virginia Branch), conveyor adjuster (Virginia Branch), and helper at the Richmond and Virginia Branches of the defendant Company.

11. All of the other job classifications for hourly employees, which are not under the jurisdiction of the I.B.E.W. or the I.A.M.A.W. Unions, are under the jurisdiction of Local 182 of the Tobacco Workers' International Union (T.W.I.U.).

12. From 1953 to the present, the defendant Company has had federal government contracts for the sale of some of its products.

13. The Company's first Equal Employment Opportunity program was drawn up in 1956, and the second pro-

gram was drawn up in 1962. (A copy of these programs is attached hereto as Exhibits A and B respectively.)

14. Beginning in 1956 the defendant Company conducted a program of plant modernization in the Prefabrication Department of the Virginia Branch which included the phase out of old machines and techniques and the initiation of new automated processes. As the result of this program, sixteen black employees were transferred to the Prefabrication Department and six were sent to the Richmond Branch between 1956 and 1958.

15. The Virginia Branch of the defendant Company is divided into two major departments—Prefabrication and Fabrication.

16. The Prefabrication Department at the Virginia Branch of the defendant Company is subdivided into the Turkish, Casing, and Cutting Departments.

17. The Fabrication Department at the Virginia Branch of the defendant Company is subdivided into the Making, Packing, Shipping, and Receiving Departments.

18. The Richmond Branch of the defendant Company is divided into two major departments—Prefabrication and Fabrication.

19. The Prefabrication Department at the Richmond Branch is subdivided into the Cooking, Dipping and Drying, Long Cut, Blended Stock, High Grade, Guardite, Stem Rolling, and Shipping and Receiving Departments.

20. The Fabrication Department at the Richmond Branch contains only the Packing Department.

21. Both the Richmond and Virginia Branches of the defendant Company have a Mechanical, Medical, and Clerical Staff.

22. Prior to September 16, 1963, the Company recognized two locals of the T.W.I.U. at the Richmond and Virginia Branches of the defendant Company. One of these Locals, No. 216, had an all black membership and had jurisdiction over job classifications located primarily in the Prefabrication Department of the Richmond and Virginia Branches of the defendant Company. The other T.W.I.U. Local, No. 182, had an all white membership and had jurisdiction over only those job classifications located in the Fabrication Department of the Richmond and Virginia Branches of the defendant Company.

23. Executive Order No. 10925, which was issued by President Kennedy and became effective on March 6, 1961, detailed specific penalties for a government contractor in noncompliance with federal requirements for equal employment opportunity.

24. Approximately 81% of the hourly paid workers in the Prefabrication Department of the Virginia Branch are black. None of the adjuster-prefabrication have ever been black.

25. At the present time, 2 of the 3 adjuster helpers—prefabrication at the Virginia Branch are black.

26. In order to become an adjuster—prefabrication, an employee must first serve as an adjuster helper—prefabrication.

27. In order to become an adjuster learner in the Fabrication Department of the Virginia Branch, it is necessary that an employee be a packing, Schmermund or making machine operator. Only packing and Schmermund machine operators are eligible to become adjuster learner-packers, and only making machine operators are eligible to become adjuster learner-makers.

28. The labor rates for hourly employees and for all job classifications at both the Richmond and Virginia Branches under the jurisdiction of Local 182 and former Local 216 of the Tobacco Workers' International Union have been negotiated for every contract period since 1937.

29. John Patterson was initially employed by the defendant Company as a tobacco tub handler at the Virginia Branch on April 4, 1946.

30. Percy Taylor was initially employed by the defendant Company as a laborer in the Prefabrication Department at the Virginia Branch on May 12, 1941 and was reemployed on September 19, 1944 after quitting on May 5, 1944.

31. James Randolph was initially employed by the defendant Company as a laborer in the Prefabrication Department of the Virginia Branch on September 23, 1952.

32. Marion Moshoe was initially employed by the defendant Company at the Richmond Branch as a laborer in the Prefabrication Department on February 3, 1958.

33. Edmund Page was initially employed by the defendant Company as a laborer in the Prefabrication Department of the Richmond Branch on August 20, 1948.

34. All of the named plaintiffs joined Local 216, T.W.I.U. after being hired by the defendant Company.

35. None of the named plaintiffs became members of the defendant Local 182 until September 16, 1963.

36. All of the named plaintiffs have been members of the defendant Local 182 since September 16, 1963, and are currently members of that Local.

37. The named plaintiffs are blacks who are currently employed as hourly production workers by the defendant Company at either the Richmond Branch or the Virginia Branch, and are members of the defendant Local 182 of the Tobacco Workers' International Union.

38. On January 15, 1968 the defendant Company instituted a system (which is still in effect) whereby permanent vacancies in classifications under the jurisdiction of Local 182 of the T.W.I.U. at both the Richmond and Virginia Branches were filled through job posting and employee bidding. Under this system, all such vacancies are posted on plant bulletin boards for seven working days. Anyone in the bargaining unit may sign any posting (bid on any job) with the exception of postings for vacancies in the adjuster, learner adjuster, examiner-making, examiner-packing, adt dryer operator, textile dryer operator, overhaul adjuster-making or packing, and turbine operators classifications at the Virginia Branch and adjuster and learner adjuster at the Richmond Branch.

39. Only employees who have become learner adjusters are eligible to move into vacancies in the adjuster classification.

40. Only employees who are experienced as a packing or making machine operator or Schmermund boxer operator are eligible to bid on vacancies in the learner adjuster classification.

41. Only employees who are experienced as a catcher are eligible to bid on vacancies in the examiner-making classification.

42. Only employees who are experienced as line searchers-Schmermund boxer are eligible to bid on vacancies in the examiner-packing classification.

43. Only those employees who have become an assistant adt dryer operator are eligible to move into vacancies in the adt dryer operator classification.

44. Only those employees who have become an assistant textile dryer operator are eligible to move into vacancies in the textile dryer operator classification.

45. Only those employees who have become a making or packing adjuster are eligible to move to vacancies in the overhaul adjuster classification.

46. Only those employees who have become an adjuster helper-prefabrication are eligible to move to the adjuster-prefabrication classification.

47. Only those employees who have become boiler operators are eligible to move into vacancies in the turbine operator classification.

48. The only formal or procedural requirement for an employee's bidding on a job, except those noted in No. 38, is for the employee to sign the posting in any location where it is displayed. When the posting is removed from the bulletin boards at the end of the seven working days, the plant seniority dates of all persons signing are compared and the most senior signer is given the first opportunity to learn the job.

49. As a general rule, since September 16, 1963, employees within the Local 182 of the T.W.I.U. bargaining unit are given preference for any vacancies in job classifications within the bargaining unit, and hiring is performed only for entry level jobs unless all of the employees refuse to accept a vacancy.

50. None of the job classifications under the jurisdiction of the I.B.E.W. or the I.A.M.A.W. Unions are subject to

the posting and bidding systems of filling permanent vacancies.

51. Under the posting and bidding procedure, once an employee has bid on and been awarded a permanent position, he/she enters into on-the-job-training wherein experienced employees who are already classified in a particular position instruct the employee new to the position as to the duties and responsibilities of the position.

52. If any employee decides within fourteen days after beginning his training period that he/she does not wish to accept the position, that employee can "sign off" the job and return to his/her former position.

53. If an employee decides after being assigned to a position for over fourteen days that he does not wish to accept that position, he may not "sign off" the job. However, he may sign another posting and, if he is successful, thereby remove himself from the first position.

54. There are no established limits on the length of time during which an employee may receive on-the-job training for any job classification at either the Richmond or Virginia Branch of the defendant Company.

55. The superintendent has the discretion to remove a trainee when in his opinion, after a reasonable period of time, that employee has not demonstrated that he can perform that particular job.

56. Prior to selecting an employee for promotion to a supervisory position, the defendant Company gives the local union an opportunity to make recommendations.

57. The defendant Company has never had an educational requirement for employees promoted from hourly production jobs to supervisory positions.

58. Hourly employees of the defendant Company do not have to apply or express their interest in holding a supervisory position in order to be considered for promotion to such a position.

59. The defendant Company does not have any written guidelines which are used in selecting supervisory personnel.

60. The selection of supervisors at the Richmond and Virginia Branches of the defendant Company is left to the discretion of those employees at the superintendent and manager levels of plant management.

Stipulated and agreed to this 24 day of June, 1974.

/s/ Henry L. Marsh, III
Counsel for Plaintiffs John Patterson, et al.

/s/ C. Daniel Karnes
Counsel for Plaintiff EEOC

/s/ Henry T. Wickham
Counsel for Defendant Company

/s/ Jay J. Levit
Counsel for Defendant Unions

Union Counsel does not stipulate to Nos. 9, 10, 50 & 56 for lack of sufficient information & reserves right to correct any other stip. mistakenly entered into.

/s/ J. J. L.

Exhibit A

Equal Job Opportunity

The following points were agreed to at the meeting held April 24, 1956, and constitute a plan of equal job oppor-

tunity in the manufacturing departments of the Company, in accordance with the clause in government contracts:

How many employees will be affected?

This was answered by saying that management would select the employees, as always there are employees who do not qualify for the new job and the individual employee has the right to refuse and stay on the job where he is satisfied.

Seniority status of employees moved to new jobs?

Employees given the opportunity to move in a new classification will advance in order of placement, and move backwards in reverse order, and, if necessary, return to the job from whence they came.

The jurisdiction?

The local that has jurisdiction and is bargaining for a particular classification will continue to hold jurisdiction and bargain for all employees in the classification, regardless of color or affiliation.

Racial problems?

If a problem of a racial nature becomes a grievance, the shop committee of both local unions will meet and agree on the unions' position, which will be presented to management for settlement in accordance with the grievance clause (Article 13) in the contract.

Employment?

New employees will be hired as to races on the basis of the approximate census in the plant area. This will be followed if applicants qualify for the job and are available when called.

Post-Trial Opinion of the District Court on Liability

Exhibit B

Equal Job Opportunity

There is equal job opportunity in accordance with the clause in government contracts. The following points represent the understanding of the Company and the Unions with respect to employees to whom the government contract clause is applicable and who are represented by the Unions:

Selection for New Jobs

Management will continue to select employees for new jobs on the basis of their qualifications and to recognize the right of an employee to refuse a new job and stay on the job where he is satisfied.

Seniority Status of Employees Moved to New Jobs

Employees given the opportunity to move in a new classification will advance in order of placement, and move backwards in reverse order, and, if necessary, return to the job from whence they came.

The Jurisdiction

The local that has jurisdiction and is bargaining for a particular classification will continue to hold jurisdiction and bargain for all employees in the classification, regardless of affiliation.

Grievances Where Locals Disagree

If a problem on which two locals disagree becomes a grievance, the shop committee of both local unions will meet and agree on the unions' position, which will be presented to management for settlement in accordance with Grievance Clause in the Union Contract.

Employment

The Company is an equal opportunity employer and, as such, will provide equal employment opportunities without regard to race, color, creed or national origin.

APPENDIX II

A. *Facts Relevant To The Issues Of Both Sex And Race Discrimination:*

1. American's facilities are located in the Richmond Standard Metropolitan Statistical Area (SMSA) which includes the City of Richmond and the counties of Henrico, Hanover and Chesterfield.

2. The 1960 census, which did not include Hanover County, shows:

Richmond SMSA Population	408,494	
Black Population	107,366	26%
Female Population	227,650	55%

3. The 1970 census, which included all the political subdivisions in the Richmond SMSA, shows:

Richmond SMSA Population	518,319	
Black Population	130,241	25%
Female Population	272,803	52%

4. The 1970-1973 Virginia Employment Commission estimate of the percent of the total work force which is comprised of blacks and females in the Richmond SMSA is as follows:

Minority (Black)	23.6% of the Total Work Force
Female	41.0% of the Total Work Force

5. The Richmond Office is located within the Virginia Branch. The Virginia Branch and the Richmond Branch, despite difference in street addresses,[1] are physically located

[1] The addresses of the Virginia Branch and the Richmond Branch, respectively, are 26th and Cary Streets and 21st and Grace Streets, Richmond, Virginia. A map, not to scale, showing the relative positions of the two plants, is attached as Appendix III.

very near one another. The presently practiced plant-wide seniority system, i.e., seniority determined within each of the three facilities, has, except with respect to the Richmond Office, contributed to the perpetuation of the discrimination found in finding 33 and 81. It has not been shown to be justified by any business necessity.

6. No new employees were hired to fill job classifications under the jurisdiction of the Tobacco Workers' International Union at the Virginia Branch from September 12, 1955 through May 12, 1966, nor at the Richmond Branch from September 12, 1955 through June 12, 1964.

7. Between September 16, 1963, and January 15, 1968, employees at the Virginia Branch were canvassed to determine if they were interested in procuring a position in a given job classification should a vacancy later occur.

8. Job "qualifications," as used between September 16, 1963, and January 15, 1968, were never reduced to writing. Employees learned of the specific "qualifications" either by talking to supervisory personnel or representatives of the union, or, by observing the system of promotion in operation. "Qualified," as used for this period, referred to whether or not an employee had filled a particular job before and was, in the opinion of supervisory personnel, familiar with it.

9. Employees who are permanently classified in jobs which are located in the Prefabrication Department of either branch of American generally fill temporary vacancies within the Prefabrication Department. Employees who are permanently classified in jobs which are located in the Fabrication Department of either branch of the defendant company generally fill temporary vacancies within the Fabrication Department.

10. Local 182 and the Tobacco Workers' International Union entered into collective bargaining agreements, governing, *inter alia,* wage rates for employees under its jurisdiction, which became effective in 1954, 1956, 1958, 1960, 1962, 1965, 1968, 1971 and 1974, respectively. The unions have jurisdiction over employees at the Richmond Branch and the Virginia Branch, but not the Richmond Office.

11. Supervisory personnel at the Virginia and Richmond Branches of American include the job classifications of assistant foreman, foreman, assistant superintendent, superintendent, assistant manager and manager.

12. Supervisory personnel at the Richmond and Virginia Branches of American have traditionally been either promoted from the ranks of the hourly employees, hired as new employees or transferred from other branches. Since 1960, 34% of the vacancies at the assistant foreman level have been filled by promoting former hourly employees of American.

13. Prior to selecting an employee for promotion to a supervisory position, American gives the local union an opportunity to make recommendations.

14. When the union and American's recommendation are not the same as to who should be promoted to a supervisory position, American's branch manager makes the final decision.

15. The defendant company has never had an educational requirement for employees promoted to supervisory positions from hourly production classifications.

16. Since July 1, 1965, at least eighteen employees have been hired for or promoted to the position of assistant foreman at the Virginia Branch.

17. Since July 1, 1965, at least nine employees have been hired for or promoted to the position of assistant foreman at the Richmond Branch.

18. Hourly employees of American do not have to apply for or express an interest in a supervisory position in order to be considered for promotion to such a position.

19. American does not have any written guidelines or objective standards which are used in selecting supervisory personnel.

20. Craft positions at the Virginia Branch include the job classifications of "machinist, machinist apprentice, electrician, electrician's helper, welder, carpenter-millwright, brick or cement worker, helper and pipefitter."

21. Craft positions at the Richmond Branch include the job classifications of machinist, machinist's helper, electrician, pipefitter, and carpenter.

22. Until 1971, American required that all applicants who are being considered for positions as clerks in the Richmond Office take the Minnesota Clerical Test. This test has never been certified as being either job related or predictive of job performance.

23. American has had a retirement plan for all of its employees at the Richmond and Virginia Branches since before 1942, and a profit-sharing plan since 1960.

24. An employee's share in profit-sharing and his benefits under the present retirement plan depend on yearly gross earnings.

25. Total employment[2] at the Virginia Branch declined

---

[2] The findings with regard to employment by American are broken down into figures and percentages for the Virginia Branch, the Rich-

from 2,157 in 1953 to 1,027 in 1974. Factory workers declined from 1,476 in 1962 to 829 in 1974. Factory workers hired subsequent to May 16, 1966, were all hired into entry-level jobs and were not hired for any particular vacancy. There are no records to indicate the race of applicants from 1955 to February, 1972.

26. Total employment at the Richmond Branch declined from 399 in 1953 to 218 in 1973. Factory workers declined from 227 in 1962 to 156 in 1973. There are no records to indicate the race of applicants prior to March, 1972.

27. In 1961, the Richmond Office had 59 employees, excluding supervisors; and 1969 there were 69 such employees; and, on February 28, 1974, there were 55 such employees.

28. From January 1, 1963, to June 1, 1973, there have been over 55 vacancies in the assistant foreman position at the Virginia Branch.

29. From January 1, 1963 to June 1, 1973, there have been over 30 vacancies in the assistant foreman position at the Richmond Branch.

30. Since 1966, there have been 4 vacancies in the position of supervisor in the Richmond Office.

31. The so-called "lines of progression" described in Paragraphs 38 through 47 of Stipulation I (Appendix I), with the exception of the requirements described in Paragraph 39 (learner adjuster in order to become an adjuster), Paragraph 45 (making or packing adjuster in order to be-

---

mond Branch and the Richmond Office. Because the Court finds that these three offices should be combined and considered as being at one location, the total figures have been considered for the purpose of the Court's ultimate findings.

come an overhaul adjuster) and Paragraph 46 (adjuster helper-prefabrication in order to become an adjuster-prefabrication) are not justified by any business necessity. The lines of progression other than these three have perpetuated past discrimination on the basis of sex and race.

B. *Facts Relevant To The Issue Of Race Discrimination:*

32. Prior to September 16, 1963, American discriminated on the basis of race with respect to facilities, union representation, wage structure, departments, seniority lines and hiring.

33. As a result of the low number of posted permanent vacancies at the Virginia and Richmond Branches, most black employees have been unable to move into the higher paying job classifications which had previously been restricted to whites. Consequently, a pattern of racially segregated job classifications and departments still exists in spite of American's adoption of a posting and bidding system.

34. Many of the positions in the job classification which were previously restricted to whites are now held by white employees, with less seniority than black employees, who were able to obtain these positions prior to 1968 by virtue of American's use of a racially discriminatory promotion system of plant seniority "plus qualifications," or by virtue of American's initial assignments of whites directly into these positions.

35. Black employees have received lesser amounts than white employees with comparable seniority under American's profit-sharing and retirement plans because of American's disparate wage structure and the inability of blacks to gain access to higher paying jobs.

36. Local 182 and The Tobacco Workers' International Union have negotiated and entered into labor agreements which have determined working conditions, wage rates, employee benefits and conditions for promotion. These have had the effect of continuing blacks in the lower paying, less desirable jobs at the Richmond and Virginia Branches.

37. Prior to 1963, black employees of American did not fill any temporary vacancies in job classifications which were restricted to whites. During that same period, white employees did not fill any temporary vacancies in job classifications which were restricted to blacks.

38. Prior to September 16, 1963, the Miscellaneous Department at the Virginia Branch contained two job classifications, "cleaner" and "elevator operator." All of the employees holding these classifications in this department were black. During this period, these employees were responsible for manual materials handling, by-products removal from the production floors, and cleaning the fabrication cafeteria eating area and two fabrication rest rooms.

39. For the years 1965 through 1973, black hourly-paid production workers at the Virginia Branch generally had a lower mean income than whites with equivalent plant seniority.

40. For the years 1965 through 1973, black hourly-paid production workers at the Richmond Branch generally had a lower mean income than whites with equivalent plant seniority.

41. Jobs in the Prefabrication Department of the Richmond Branch historically have had lower wage rates than jobs in the Fabrication Department of that Branch.

42. Jobs in the Prefabrication Department of the Vir-

ginia Branch have generally had lower wage rates than jobs in the Fabrication Department of that Branch.

43. Traditionally at both branches there have been more blacks in the Prefabrication Department than whites, and more whites in the Fabrication Department than blacks.

44. Jobs at the Richmond Branch have traditionally had lower wage rates than jobs at the Virginia Branch.

45. The job classification of "operator-guardite" has traditionally had the highest wage rate of any job in the Prefabrication Department of the Richmond Branch. When this classification was first introduced, the defendant company transferred two white males from the Fabrication Department, one to operate a guardite machine and the other to serve as supervisor in the guardite operation in the Prefabrication Department. All of the other employees in the guardite operation were black. There has, however, only been one guardite machine operator, a white male, who has held the job since its inception.

46.[a] As of February 26, 1963, 196 or 11.8% of the 1,653 employees at the Virginia Branch of the defendant company were black. As of January 15, 1963, of the approximate 100 supervisors none was black.

47. The first black supervisor at the Virginia Branch was promoted from the ranks of the hourly employees by American on January 16, 1963.

48. As of May 16, 1969, of the 71 employees in supervisory positions at the Virginia Branch of American, 3 were black.

---

[a] The percentages in this and subsequent findings, namely 46, 49, 52, 54 and 55, while apparently in some instance inconsistent with the finding in Paragraphs 70, 71, 72 and 73, cover years not covered by the latter and include all employees as opposed to just factory workers.

49. As of April 16, 1973, 165, or 15.49% of the 1,071 employees at the Virginia Branch of the defendant company were black. As of April 16, 1973, 5 or 7.24% of the 69 employees in supervisory positions at the Virginia Branch were black.

50. As of January 1, 1974, there were 6 black supervisors at the Virginia Branch.

51. The first black supervisor at the Richmond Branch was promoted from the ranks of the hourly employees on June 1, 1966, and was assigned to the Prefabrication Department.

52. As of April 17, 1967, 79 or 32.1% of the 246 employees at the Richmond Branch were black.

53. The second black supervisor at the Richmond Branch was promoted from the ranks of the hourly employees on February 1, 1971.

54. As of March 10, 1971, 82 or 36.7% of the 223 employees at the Richmond Branch were black. On that same date 2 or 6.6% of the 30 employees in supervisory positions at the Richmond Branch were black.

55. As of April 16, 1973, 85 or 40.67% of the 209 employees at the Richmond Branch were black.

56. As of June 1, 1973, 3 or 9.6% of the 31 employees in supervisory positions at the Richmond Branch were black.

57. As of April 15, 1973, 250 or 19.53% of the 1,280 employees at both Branches of American were black.

58. Only one black has ever held any of the positions of machinist, machinist's helper, electrician, pipefitter or carpenter at the Richmond Branch.

59. None of the employees who completed their apprenticeships at the Virginia Branch was black.

60. One of the employees who completed his apprenticeship at the Richmond Branch was black. This employee, Mr. Frank Schools, is the only black ever employed in a craft position at the Richmond Branch.

61. Only three blacks have ever been employed as craftsmen at the Virginia Branch.

62. As of April 12, 1974, 62 persons were employed in the Richmond Office, 13 of whom were black. The total work force is made up of 55 clerical employees, 6 supervisory employees, and 1 office manager. All of the black employees were classified as clerks.

The positions of office manager, assistant office manager, and supervisor in the Richmond Office have never been held by a black.

63. Although John Patterson was initially assigned to the Fabrication Department of the Virginia Branch on April 4, 1946, he could not be classified in most of the job classifications in that department until September 16, 1963, because he was black.

64. Percy Taylor and James Randolph were not eligible to hold most of the job classifications in the Fabrication Department of the Virginia Branch, including those of "Packing or Making Machine Operators," until September 16, 1963, because they were black.

65. During the period from 1954 to 1971, American sometimes assigned Marion Moshoe, a black and a named plaintiff, to various machines in the Prefabrication Department as an operator. While performing these assignments, he would be paid at the lower laborer wage rate.

66. From 1960 to the present time, Edmund Page, a black and a named plaintiff, has been classified as an "op-

erator-prefabrication and other equipment." Employees in this classification may operate as many as eight different machines. All of the employees in this classification are paid at the same wage rate.

67. All of the named plaintiffs in Patterson joined Local 216, T.W.I.U., after being hired by the defendant company.

68. None of the named plaintiffs in Patterson or members of the class they represent was eligible for membership in Local 182 until September 16, 1963, because they were black.

69. All of the named plaintiffs in Patterson have been members of Local 182 since September 16, 1963, and are currently members of that Local.

70.[4] Although there are no statistics with respect to any applicants before 1972, the evidence reveals that of those persons hired into factory positions at the Virginia Branch, from 1966, when hiring began, through 1973, 152 were black and 69 were white. A breakdown of these is as follows:

	White		Black	
1966	14	(32%)	30	(68%)
1967	5	(24%)	16	(76%)
1968	14	(36%)	25	(64%)
1969	5	(45%)	6	(55%)
1970	7	(35%)	13	(65%)
1971	None		None	
1972	1	(06%)	17	(94%)
1973	23	(34%)	45	(66%)
Totals	69	(31%)	152	(69%)

[4] The statistics in findings numbered 70, 71, 72 and 73 refer to "factory workers." These findings are taken from evidence offered by American and apparently exclude supervisory personnel and others.

71. The percentage of black factory workers at the Virginia Branch from 1962 to February 28, 1974, is as follows:

Date	Blacks	Total	Percent Black
1962	201	1,476	14%
1963	193	1,441	13%
1964	188	1,397	13%
1965	169	1,321	13%
1966	160	1,263	13%
1967	191	1,218	16%
1968	175	1,151	15%
1969	173	1,099	16%
1970	161	1,046	15%
1971	157	995	16%
1972	145	923	16%
1973	149	864	17%
1974 (2/28)	169	829	20%

72. Of the persons hired into the Richmond Branch from 1964 to 1973, 133 were black and 33 were white. A breakdown by year of these is as follows:

	White		Black	
1964	5	(38%)	8	(62%)
1965 and 1966	no hiring			
1967	1	(14%)	6	(86%)
1968	11	(31%)	24	(69%)
1969	0	(0%)	6	(100%)
1970	7	(37%)	12	(63%)
1971	2	(13%)	13	(87%)
1972	6	(16%)	32	(84%)
1973	1	(03%)	32	(97%)
Totals	33	(20%)	133	(80%)

73. The percentage of black factory workers at the Rich-

mond Branch in 1962, 1964, 1966, 1968, 1970, 1972 and 1973 was:

Date	Blacks	Total	Percent Black
1962	93	227	41%
1964	93	228	41%
1966	78	190	41%
1968	89	189	47%
1970	80	164	49%
1972	79	151	52%
1973	90	156	58%

74. In 1973, approximately 47% (27 persons) of the total applications for jobs were filed by blacks and 40% (6 persons) of the total number of hires were black in the Richmond Office. The race of four applicants is unknown.

75. In the Richmond Office, from 1961 to 1974, 17% (22 persons) of all persons hired were black; from 1965 to 1974, 18% (17 persons) of all persons hired were black; and, from 1970 to 1974, 42% (10 persons) of all persons hired were black.

In 1961 there were no black employees in the Richmond Office. In 1974, 24% (13 persons) of the non-supervisory employees were black.

76. There are approximately two hundred non-craft hourly paid job classifications at the Virginia Branch. As of 1973 there were eighteen which had never been held by a white employee, and ten which had never been held by a black employee.

77. There are approximately 43 non-craft hourly paid job classifications at the Richmond Branch. As of 1973 there were twenty-one which had never been held by a white employee; and nine which had never been held by a black employee.

78. The positions of office manager, assistant office manager, and supervisor in the Richmond Office have never been held by a black employee.

79. Since 1966, there have been four vacancies in the position of supervisor in the Richmond Office. One supervisory vacancy in 1966 was filled by a white male employee who had less seniority than several white females in the Richmond Office. Two supervisory positions were filled on August 1, 1973, by white male employees transferred from the Charleston Branch which was being phased out. One of these two employees had been the office manager at the Charleston Branch, while the other had been an office supervisor in that office. As of April 12, 1974, there was one unfilled supervisory position in the Richmond Office.

C. *Facts Relevant To The Issues Of Sex Discrimination:*

80. Prior to September 16, 1963, American discriminated on the basis of sex with respect to wage structure, departments, seniority lines and hiring.

81. The same finding, except with regard to sex instead of race, is made as in finding 33.

82. As of January 15, 1963, of the approximately 1,653 employees at the Virginia Branch of the defendant company there were approximately 100 supervisors of which none was female.

83. As of May 16, 1969, of the 71 employees in supervisory positions at the Virginia Branch of American none was female.

84. As of April 16, 1973, 453 or 42.3% of the employees at the Virginia Branch were female. As of April 16, 1973, of the 69 employees in supervisory positions, 3 or 4.34% were female.

85. As of April 17, 1967, 107 or 43.5% of the employees at the Richmond Branch were female.

86. As of February 1, 1971, none of the 30 supervisors at the Richmond Branch were female, with the exception of the office supervisor.

87. As of April 16, 1973, 32% of the employees at the Richmond Branch were female.

88. As of June 1, 1973, 31 employees in supervisory positions at the Richmond Branch, 2 or 6.4% were female.

89. In 1972, 18.3% (26 persons) of the total applications for jobs were filed by females and none was hired at the Virginia Branch. In 1973, 39% (274 persons) of the total applications for jobs were filed by females and 19% (12 persons) of the total hires were female.

90. The percentage of female factory workers at the Virginia Branch from 1962 to February 28, 1974, is as follows:

Date	Females	Total	Percent Females
1962	687	1,476	47%
1963	675	1,441	47%
1964	663	1,397	47%
1965	629	1,321	48%
1966	607	1,263	48%
1967	578	1,218	47%
1968	531	1,151	46%
1969	505	1,099	46%
1970	478	1,046	46%
1971	453	995	46%
1972	418	923	45%
1973	385	864	45%
1974 (2/28)	359	829	43%

91. In 1972, 12% (39 persons) of the total applications for jobs were filed by females and none was hired at the Richmond Branch. In 1973, 30% (146 persons) of the total applications for jobs were filed by females and 30% (10 persons) of the total hires were female.

92. The percent of female factory workers at the Richmond Branch in 1962, 1964, 1966, 1968, 1970, 1972 and 1973 was:

Date	Females	Total	Percent Females
1962	109	227	48%
1964	109	228	48%
1966	89	190	47%
1968	89	189	47%
1970	66	164	40%
1972	54	151	36%
1973	56	156	36%

93. During the period 1961 to 1974, approximately 93% of all persons hired at the Richmond Office were female and in 1974, 89% (49 persons) were female. In 1961, 75% (44 persons) of the non-supervisory employees were female and in 1974, 89% (49 persons) were female.

94. There are approximately two hundred non-craft hourly paid job classifications at the Virginia Branch. As of 1973, there were thirty-three such positions which had never been held by a female employee, and six which had never been held by a male employee.

95. There are approximately 43 non-craft hourly paid job classifications at the Richmond Branch. As of 1973, there were thirty-two such positions which had never been held by a female employee, and six which had never been held by a male employee.

96. Until at least September 16, 1963, American considered the following Virginia Branch job classifications to be "male" classifications:

Adjuster—Overhaul—Making and Packing
Adjuster—Controller
Adjuster—Making—From Filter Operator (for 7 Machines)
Adjuster—Making and Packing—70 mm or 85 mm (13-14-15 Machines)
Operator—Turbine
Adjuster—Making and Packing—70 mm or 85 mm (up to and including 12 Machines)
Operator—Boiler
Painter—Spray
Operator—Air Conditioning
Painters—Brush
Cigarette—Drum Maintenance
Operator—Making—Filter Tip—1250 Cpm.
Operator—Making (Combination Unit)—All Lengths—1500 Cpm.
Operator—Packing (with Combination Unit or Pneumatic System) All Lengths—with Automatic Package Handling—150 ppm.
Operator and Relief—Making—85 mm Filter (1050 cpm.)
Operator—Making (Combination Unit)—70 mm (1250 cpm.) and 85 mm (1125 cpm.)
Operator—Packing Machine (Combination Unit)—70 mm (125.5 ppm.) and 85 mm (112.5 ppm.)
Tractor Trailer Drivers
Operator and Relief—Box Machines—2 Machines (over 15 packers)
Adjuster—Learner (Making and Packing—70 mm and 85 mm)

Cutting Stamps
Operator and Relief—Box Machines—2 Machines (thru 15 Packers)
Operator—Container Packer (25 or more Machines)
Operator and Relief—Making and Packing—70 mm (1125 cpm. (112.5 ppm.) and 85 mm 930 cpm.) (105 ppm.)
Operator—Dryer (Textile or Adt)
Operator—Container Packer (from 17 through 25 Machines)
Truck Driver
Crew Leader—Shipping
Operator—Hot Sealing Machine (Export)
Strapping and/or Sealing Containers (Export)
Cooking Dip and Invert
Past Cook
Packers and Checkers—Shipping
Operator—Industrial Trucks
Chauffeurs—Light Delivery
Operator and Relief—Box Machines—1 Machine (over 8 Packers)
Operator Assistant—Dryer (Textile and Adt)
Operator—Overshot Cylinder and Overshot Cylinder and Mixing
Operator—Wringing Machine
Sealing Containers
Stock Handlers—Shipping
Truck Helpers
Oiler
Operator—Container Packer (up thru 16 Machines)
Watchman
Operator and Relief—Box Machines—1 Machine (thru 8 Packers)
Operator—Scrubbing Machine

Coal Handlers
Bulker—Strip Tobacco
Factory Supply and Floorman
Hopper Fillers
Lay Out Supplies
Making Flavoring Helper
Operator—Tag Meter
Weighers and Handlers (Turkish)
Cooking Dip and Invert Helper
Bulker—Cut Tobacco
Bulker—Trucking Leaf
Feeders—Strip Stems or Shorts
General Helper
Operator—Palletizing Truck
Silver Machine Man
Sweco and Air Table Man
Machine Cleaners
Baking Scrap Paper
Cleaners (Male)
Cleaners—Air Conditioning System
Dressing Cut Tobacco
Feeder—Casing Department
Floor Labor
Material Supply Distribution
Operator—Elevator
Receiving and/or Handling Supplies

97. Until at least September 16, 1963, American considered the following Virginia job classifications to be "female" classifications:

Closing and Sealing Containers (Female)—Export
Forming and Inserting Bags in Containers—Export
Packing Containers—Export

Relief—Export
Examiners—Automatic
Catcher—Filter Tip—1250 cpm.
Catchers and Relief (Combination Unit—All Lengths—1500 cpm.)
Cigarette Paper Records
Cigarette Weighing—Individual
Examiners—Manual
Sieve Testing
Catchers and Relief—70 mm (up to 1125 cpm.)
Catchers and Relief—70 mm (1250 cpm.) and 85 mm (1125 cpm.) Combination Units
Packing in Cartons—Combination Unit
Packing Containers by Hand—85 mm (Female)—More than 6 Packing Machines
Stencil Cutters
Catchers and Relief—70 mm (up to 1025 cpm.) 85 mm (up to 930 cpm.)
Packing Containers by Hand—85 mm (Female)—6 Packing Machines or less
Packing into Cartons and Relief
Carton Searchers
Rehandler
Packing Container by Hand—70 mm (Female)
Feeders—Cutting Machine (Female)
Cleaners (Female)
Feeders—(Female)
Pickers and Searchers (Female)

98. For the years 1965 through 1972, female hourly paid production workers at the Virginia Branch had a lower mean income than males with comparable seniority.

99. For the years 1967 through 1972, female hourly

paid production workers at the Virginia Branch had a lower mean income than males with comparable seniority.

100. In 1972, American selected from the ranks of its hourly production workers its first female supervisor at the Virginia Branch, to fill the position of assistant foreman. At that time approximately 43% (490) of the total Virginia Branch work force was female.

101. As of June 1, 1973, there were three female assistant foremen at the Virginia Branch out of a total supervisory staff of 73. Thus, of the supervisors at the Virginia Branch 4 percent were female.

102. In 1967, American selected from the ranks of the hourly production workers its first female supervisor at the Richmond Branch to fill the position of assistant foreman. At the time approximately 31% (107) of the total Richmond work force was female.

103. As of June 1, 1973, there were thirty-one supervisors at the Richmond Branch of whom two (6%) were females.

104. No female has ever held a craft position at the Virginia Branch.

105. No female has ever held a craft position at the Richmond Branch.

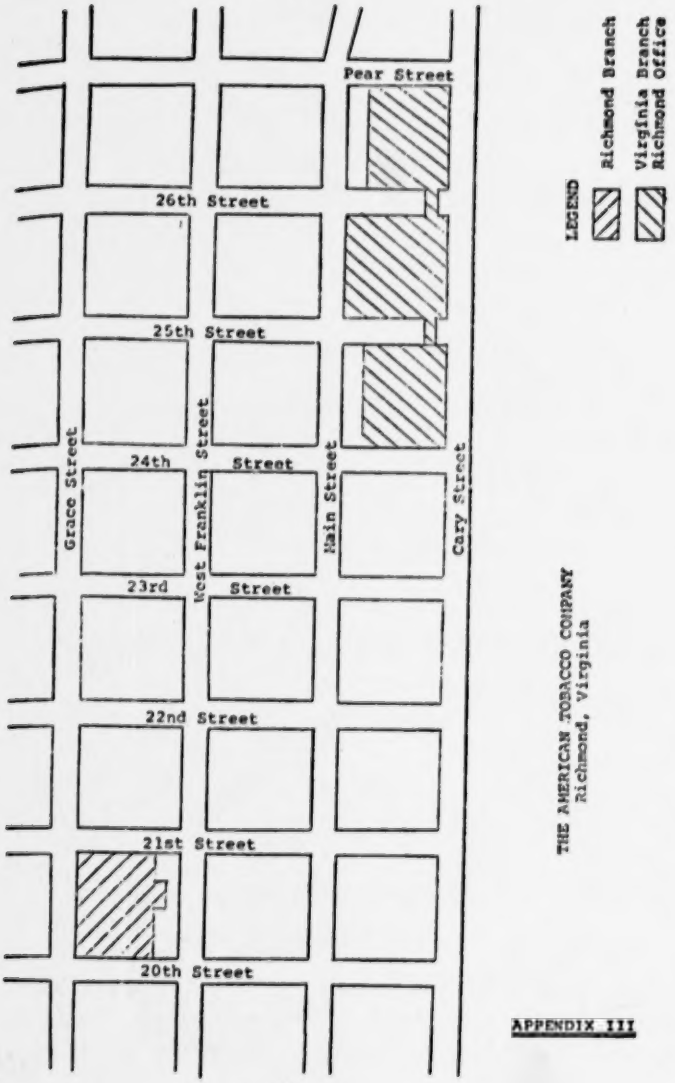
106. The positions of office manager, assistant office manager, and supervisor in the Richmond Office have never been held by a female employee.

107. Since 1966, there have been four vacancies in the position of supervisor in the Richmond Office. One supervisory vacancy in 1966 was filled by a white male employee who had less seniority than several white females in the

Richmond Office. Two supervisory positions were filled on August 1, 1973, by white male employees transferred from the Charleston Branch which was being phased out. One of these two employees had been the office manager at the Charleston Branch, while the other had been an office supervisor at that office. As of April 12, 1974, there was one unfilled supervisory position in the Richmond Office.

Post-Trial Opinion of the District Court on Liability

Appendix III



* * *

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 101-73-R

John Patterson, et al.,

Plaintiffs,

v.

The American Tobacco Co., et al.,

Defendants.

Civil Action No. 104-73-R

Equal Employment Opportunity Commission,

Plaintiff,

v.

American Brands, Inc., et al.,

Defendants.

MEMORANDUM OPINION

Entered December 31, 1974

The Court has considered the defendants' Motion to Amend and Supplement Findings of Fact and Conclusions of Law and Motion to Proffer Additional Evidence, the

plaintiffs' Motion to Alter Judgment and the proposed decrees and objections thereto submitted by the parties.

Statute of Limitations

The plaintiffs' Motion to Alter Judgment is addressed to the applicable limitation for the back pay award. The Court adheres to its original conclusion that under 42 U.S.C. § 1981 the limitation is five years prior to March 2, 1973, which would be March 2, 1968, if the claims here asserted were limited to 42 U.S.C. § 1981. They are not so limited, however, since Title VII claims are asserted, as a result of which the back pay awards may go back as far as two years prior to the filing of charges with the EEOC, i.e., until January or February, 1967, for race discrimination and until April, 1967, for the sex discrimination.

The Court further concludes that the five year limitation is not tolled during the pendency of the charges before the EEOC. There is respectable authority to the contrary;[1] however, the two claims are separate and independent and there seems to be no persuasive reason to treat the instant claim differently from other separate and independent ones, a treatment which does not, traditionally, toll the limitation of one claim while another is being administratively pursued. *Johnson* v. *Railway Express Agency, Inc.*, 489 F.2d 525, 531 (6th Cir. 1973), *cert. granted* 417 U.S. 929 (1974) (No. 73-1543; argued Dec. 11, 1974). While there may be policy reasons for such tolling, in the Court's view those should be left to the wisdom of the legislative branch of government.

---

[1] *Pattway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 258 (5th Cir., 1974); *Brandreaux* v. *Marine Contracting Co.*, 437 F. 2d 1011, 1017 n. 16 (5th Cir., 1971).

Opinion of the District Court on Relief and Decree

American's Motion to Amend and Supplement and to Proffer Additional Evidence

The Court has examined the detailed amendments and supplements requested, and while it hesitates to treat the motions, obviously prepared with sincerity and industriousness, in a summary manner, the requests are in actuality a reargument of the merits of the actions. No finding of substance is requested that has not been requested before. No piece of evidence now cited in support of the request has not been considered previously. The changes requested as to form are unnecessary in the Court's opinion, and the requested supplemental findings are adequately covered in existing ones. The Motion to Amend and Supplement is accordingly denied.

The Motion to Proffer Additional Evidence must also be denied. The case was thoroughly and skillfully presented on July 15, 1974, *et seq.*, by all parties. If additional evidence is presented now by the defendants, other parties will legitimately be entitled to offer additional evidence. It is time these actions, now nearly two years old, came to a conclusion, at least at the trial level. Even after this Memorandum and the entry of the attached decree, there is yet the question of damages. The request for oral argument at this stage, however, is also denied.

The Decree

The Court has this day entered a Decree in the actions. As the parties will recognize, it is substantially the decree as proposed by the plaintiffs. Minor changes, among others, include alterations in some time limits, a less frequent reporting requirement, and additions to reflect the Court's

ruling on the applicable limitation with respect to back pay. In addition a change of some substance has been made in the manner of selecting new jobs by members of the two classes. The viewing of jobs by the class member has been postponed until after he knows for which jobs he can qualify. The provision for sixteen hour tryout on the jobs selected has been eliminated, because the Court feels this to be wasteful and unnecessary so long as the class member has an opportunity to make an informed choice as to the job he wants. This opportunity is amply afforded by the job descriptions, the tour and the view.

The Court has some reservations about the accuracy with which the Company can determine the three jobs for which a class member, particularly one with low seniority, is eligible. Presumably plaintiffs have considered this practical problem in making their proposal, and if it can be accomplished the Court feels that this is the desirable way to proceed.

The Decree has been entered after giving due consideration to American's contention that its terms will create disruption in the efficient running of American's business. Undoubtedly some disruption is unavoidable. The Court doubts that it will be to the extent voiced by the Company and hopes that it will not be. If, however, carrying out the terms of the Decree results in an inefficient operation for two or three days, or even as much as ten days, the past inequities clearly warrant this temporary loss to eliminate the present effects of those inequities.

The Court would like a prompt hearing to determine the method of calculation and distribution of the back pay award and adjustment to the pension and profit-sharing plans, and to what extent, if any, additional evidence will be necessary to effectuate these determinations. The after-

noons of January 10, 17, 24 and 31, 1975, in Alexandria, are available for the Court. If it is inconvenient to counsel to come to Alexandria, arrangements can be made for such a hearing in Richmond.

/s/

United States District Judge

Alexandria, Virginia
December 31st, 1974

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 101-73-R

John Patterson, et al.,

Plaintiffs,

v.

The American Tobacco Co., et al.,

Defendants.

Civil Action No. 104-73-R

Equal Employment Opportunity Commission,

Plaintiff,

v.

American Brands, Inc., et al.,

Defendants.

DECREE

These cases, *John Patterson, et al.* v. *The American Tobacco Co.*,[1] *Tobacco Workers International Union and Local 182, Tobacco Workers International Union* (Civil

[1] All references herein to "American" are to the facilities of The American Tobacco Company, a division of American Brands, Inc., known as the Virginia Branch, the Richmond Branch, and the Richmond Office.

Action No. 101-73-R), and *Equal Employment Opportunity Commission* v. *American Brands, Inc. and Local 182, Tobacco Workers International Union* (Civil Action No. 104-73-R), which were consolidated for trial, came on before the Court, sitting without a jury, in July, 1974, limited to the issues of liability for back pay and injunctive relief and those issues having been heard and duly tried, and a Memorandum Opinion[2] and Findings of Fact having been filed by the Court on September 25, 1974, it is now ADJUDGED, ORDERED and DECREED:

The defendants, The American Tobacco Company ("American" or "the Company"), the Tobacco Workers International Union ("International Union"),[3] and Local 182, Tobacco Workers International Union ("Local 182" or "TWIU"), their officers, agents, employees and servants and all persons in active concert or participating with them shall be and are hereby permanently enjoined and restrained from discriminating against the affected classes of black and female employees of the Company as herein described because of their race or sex in violation of Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and The Civil Rights Act of 1866, 42 U.S.C. § 1981, at the Company's Richmond Branch, Virginia Branch and Richmond Office located in Richmond, Virginia.

[2] Pursuant to the Court's request, counsel for all parties have conferred and have submitted individual proposed decrees, which have been examined by the Court. Because, in some instances the Court has adopted the proposed language of one or more of the parties, portions of this Decree may vary from the provisions of the Memorandum Opinion; whenever such variations occur, it is the Court's intent that this Decree should be controlling.

[3] The Tobacco Workers International Union ("the International") is not a defendant in the EEOC action (Civil Action No. 104-73-R). In addition to the allegations of racial discrimination raised in *Patterson* (Civil Action No. 101-73-R) the EEOC action contains allegations of sex discrimination. None of the provisions of this decree pertaining to sex discrimination is applicable to the International.

Opinion of the District Court on Relief and Decree

I. *The Class and the Affected Class*

1. The class of blacks (Class I) for the purposes of this Decree shall consist of:

> All black persons, whether currently employed or not, who were employees of the defendant Company on or after July 2, 1965.

2. The affected class of females (Class II) for the purposes of this Decree shall consist of:

> All females, whether currently employed or not, who were employees of the defendant Company on or after July 2, 1965.

II. *The Seniority System*

1. The defendants are enjoined from implementing, maintaining, or giving effect to any seniority system, whether pursuant to any collective bargaining agreement or otherwise, which is designed to discriminate or has the effect of discriminating against members of Class I or Class II.

2. The Company shall compile within thirty (30) days from the entry of this Decree:

A. A list of all current employees in order of Company seniority in the TWIU bargaining unit at the Richmond and Virginia Branches indicating race, sex, Company seniority date, branch, job classification and employee identification number.

B. A list of all current black employees as of the date of this Decree, who have worked for the Company at any time since July 2, 1965, in order of Company seniority indicating Company seniority date, sex, branch, current job classification and employee identification number.

C. A list of all black employees who have worked for the Company at any time since July 2, 1965, who are no longer working for the Company for any reason, indicating the employee's name, sex, branch, Company seniority date, date of termination, reason for termination and employee identification number.

D. A list of all current female employees as of the date of this Decree, who have worked for the Company at any time since July 2, 1965, in order of Company seniority indicating Company seniority date, branch, race, current job classification and employee identification number.

E. A list of all female employees who have worked for the Company at any time since July 2, 1965, who are no longer working for the Company for any reason indicating the employee's name, race, Company seniority date, branch, date of termination, reason for termination and employee identification number.

F. A list of all job classifications by branch in the TWIU bargaining unit (excluding adjuster and overhaul adjuster) by order of wage rate, indicating the number of positions in each classification and the name, Company seniority date, race, sex and employee identification number of each incumbent employee.

3. Within thirty (30) days from the entry of this Decree, the above lists shall be filed with the Court and served on counsel for plaintiffs and the unions. In addition, the list in Section II, 2, A, shall be posted in the normal posting locations at each Branch and shall remain posted until the provisions of Section II of this Decree are concluded.

4. The Company shall implement for TWIU bargaining unit jobs at the Richmond and Virginia Branches the

procedure set forth in Paragraphs 5 through 11 below. For the purposes of this procedure, no job qualifications shall be required except the requisite seniority and a willingness to learn the job; provided, however, that for the jobs of adjuster and overhaul adjuster the qualifications listed in Finding of Fact No. 31 shall remain in effect.

5. American shall prepare job descriptions for all TWIU bargaining unit jobs within thirty (30) days after the entry of this Decree, which descriptions (a) are for informational purposes only, (b) are not intended to indicate all of the duties to be performed, and (c) will be used for no purpose other than to inform employees of the general nature of such jobs. Unless plaintiffs object to the job description and provide suggested modifications within fifteen (15) days after receiving a copy of them, such descriptions will be deemed to comply with this Decree. A copy of such job description shall be posted on bulletin boards located in conspicuous places at the Richmond and Virginia Branches and a copy shall be furnished to any employee who requests the same.

6. Within fifteen (15) days after copies of job descriptions are posted, all currently employed blacks and females in the TWIU bargaining unit shall be given an opportunity to tour both the Richmond Branch and the Virginia Branch. No such person need be given an opportunity to tour any department to which he has been assigned for thirty (30) days or longer.

A. Within ten (10) days after the expiration of the period prescribed in the preceeding paragraph, all currently employed members of Class I and Class II shall be given the opportunity to select not more than five jobs in order of preference.

B. Within ten (10) days after the expiration of the period described in Section II, 6, A, the Company shall determine the top three jobs on each class member's preference list that the Company reasonably anticipates such class member's seniority would permit him[4] to hold. Should the Company conclude that a Class I or Class II member's seniority would not permit him to ascend to at least three of the jobs on such preference list, that class member shall be given the opportunity to list additional jobs, totaling five when combined with the number of jobs the Company already has anticipated he would hold. The Company again shall determine if such class member's seniority would permit him to ascend to any of the jobs newly selected. This process shall be repeated until there are at least three jobs on such class member's list that the Company reasonably anticipates would be available to him. If it is determined that a class member's seniority would not permit him to ascend to any job of his selection, *that class member shall remain in his original job.*

Seniority as used herein is the length of Company service from the most recent date of Company employment.

C. Within thirty (30) days after the expiration of the period prescribed in Section II, 6, B, all currently employed members of Class I and Class II shall be given the opportunity to view the three jobs selected pursuant to that paragraph in operation for a period of not more than one hour each.

7. A. Within five (5) days from the completion of the procedure set forth in Section II, 6 above, each currently employed black and female shall be canvassed personally in the order of decreasing seniority at which time such

[4] All references to either gender shall be construed as applying to both genders throughout this Decree.

person shall be given the final opportunity to select the job to which his seniority would entitle him. Any employee who would be displaced from his present job as the result of the "bumping" rights afforded blacks and females under the provisions of this paragraph shall be entitled during the canvass process to select another job to which his seniority would entitle him, and each employee successively displaced shall be entitled to the same right.

B. Upon completion of the canvass, American shall commence implementation of the "bumping" process in order of decreasing seniority.

8. Should such employee entitled to the "bumping" rights as set forth in Section II, 7, elect not to exercise such rights, such election shall be made in writing on the form attached hereto as Exhibit A.

9. Any employee who should elect to exercise the "bumping" rights as set forth in Section II, 7, may elect to be removed from his selected job within fourteen (14) working days after being assigned to said job. Once an employee returns to his original classification as aforesaid, or remains in his selected job more than fourteen (14) days, all of his "bumping" rights shall be ended. Any vacancy which occurs as the result of the return by an employee to his original job within fourteen (14) working days shall be filled in accordance with the terms and conditions of the collective bargaining agreement between the defendants now in effect.

10. The Company may remove an individual from a position should that individual fail to demonstrate that he is capable of performing the duties of his selected job; provided, however, that in no case may the Company utilize standards more stringent than standards presently utilized.

11. Displaced employees: In the event that any incumbent employee is displaced as a result of the "bumping" relief provided for herein and has had to move to a job having a lower rate, such employee shall have his or her wages "red-circled" (a) until the wage level for the job to which the employee has been moved reaches the level at which he was formerly being paid, or (b) until the employee voluntarily moves to a job with a rate lower than the job to which he was displaced, or (c) until the employee moves to a job with a rate equal to or higher than the red-circled rate, or (d) until such time as the employee fails to avail himself of the opportunity to move to a job with a rate higher than the job to which he was displaced; provided, however, that under sub-paragraph 11(d), no displaced employee shall be required to move more than once in each six-month period to a job with an hourly rate higher than the job to which he was displaced, nor shall he be required to move to a job with an hourly rate which is less than five (5) cents per hour above the rate of the job to which he was displaced or which he is occupying at the time.

12. During the canvass provided for in Section II, black employees and white female employees at the Richmond Branch or the Virginia Branch who qualify for "bumping" rights under the provisions of Section II, 7, and who desire to transfer to the other Branch, shall have the right to do so on the basis of their seniority.

II-A *Company-wide Seniority and Transfer Rights of Currently Employed Class I and Class II Members*

After the completion of the procedure outlined in Section II, 5, or, until all Class I and Class II members who

indicate their desire to transfer to another Branch have had an opportunity to do so, in accordance with the procedures outlined herein, the following Company-wide seniority and transfer rights shall be in effect:

1. A Class I or Class II member must indicate such desire on the form attached hereto as Exhibit B within thirty (30) days after the completion of the procedure outlined in Section II, 7.

2. A vacancy shall be as defined in the current collective bargaining agreement between the Company and the Union defendants.

3. Notice of a vacancy shall be posted in conspicuous places at both Branches. All members of Class I and Class II who have indicated their desire to transfer shall be given the opportunity to bid on the job posted.

4. Should such Class I or Class II member be the most senior bidder in terms of Company-wide seniority, he shall be entitled to fill the vacancy.

5. Should such Class I or Class II member transfer, he will carry with him the Company-wide seniority which will be used for all purposes, including promotion or demotion.

6. Should such Class I or Class II member twice refuse an opportunity to transfer to a vacancy for which he is the senior bidder, he thereupon will lose his right to transfer from one Branch to the other.

III. *Supervisory Personnel*

The Company is enjoined from implementing, maintaining or giving effect to any criteria utilized for the selection of supervisory personnel which is designed to or has the effect of discriminating against black or female candidates for supervisory positions.

The Company is ordered to formulate objective criteria for the promotion or selection of supervisory personnel. Job descriptions and selection criteria for supervisory positions shall be formulated in accordance with the procedure set forth in Section II, 5, herein.

Vacancies in assistant foreman and foreman positions at the Richmond Branch and Virginia Branch and vacancies in the Office Supervisor positions at the Richmond Office shall be filled with blacks and females, except when the Company is unable to hire a qualified black or female, until, (1) the percentage of blacks in supervisory positions approximately equals the percentage of blacks in the Richmond, Virginia, SMSA work force, and (2) the percentage of females in supervisory positions approximately equals the percentage of females in the Richmond, Virginia, SMSA work force. The Company is not required to fill any such position with any person not qualified for it nor is it required to retain any person in any such position if, after a reasonable time, he is unable to perform competently the duties of such position. The decision as aforesaid is that of the Company and will not be disturbed absent a showing of race or sex discrimination.

IV. *Crafts*

For the reasons stated in the Memorandum Opinion, relief with respect to the hiring, training, or promotion of employees for craft positions at the Richmond and Virginia Branches is denied.

V. *Testing*

The screening tests used by the Company in the selection of employees to fill the position of "electronics adjustor" have had no discriminatory effect on blacks or females.

VI. *Hiring*

For the reasons stated in the Memorandum Opinion, relief with respect to the hiring of hourly paid production workers is denied.

VII. *Back Pay*

1. Hourly-paid[5] blacks who were employees of the defendant Company on or after July 2, 1965, whether currently employed or not, and (2) hourly-paid[5] females whether currently employed or not who were employees of the Company on or after July 2, 1965; shall be entitled to recover back pay from the defendants in an amount to be fixed by subsequent order of this Court and for the period beginning in January, 1967, for Class I employees and April, 1967, for Class II employees.

VIII. *Pension and Profit-Sharing Plans*

(1) Hourly-paid blacks who were employees of the defendant Company on or after July 2, 1965, whether currently employed or not; and (2) hourly-paid females who were employees of the Company on or after July 2, 1965, whether currently employed or not; shall be entitled to recover from the defendants compensation and adjustments to the pension and profit-sharing plans to recoup benefits lost as a result of the effects of past discrimination, in an amount to be fixed by subsequent order of this Court and for the same period as provided for back pay above.

IX. *Collective Bargaining Agreements*

The collective bargaining agreement now in effect and all subsequent collective bargaining agreements shall re-

[5] Craft employees in jobs which are not covered by the collective bargaining agreement between American and Local 182 are excluded from this definition.

main in, and continue to have, full force and effect, except insofar as such agreements are inconsistent with the provisions of this Decree. Should a conflict arise between the provisions of the collective bargaining agreement and the provisions of this Decree, the terms of this Decree shall prevail.

X. *Notice*

The defendants shall give notice of this Decree to all Company employees and Union members affected thereby, by posting for a period of sixty (60) days copies of this Decree on bulletin boards, located in conspicuous places at its Richmond and Virginia Branches, the Richmond Office, and the Union facilities.

XI. *Cost and Attorneys' Fees*

Plaintiffs are awarded their costs and expenses to be taxed against the defendants. Plaintiffs in *Patterson* are entitled to recover reasonable attorneys' fees and expenses as a part of their cost of this action.

XII. *Reporting Procedure*

1. The defendants shall make bi-annual reports to this Court, the first report being due on March 15, 1975, with copies sent to counsel for plaintiffs, which shall contain:

A. Supervisory positions: (1) a listing of all supervisory vacancies, by title, department, and facility, which have occurred since the last report; (2) the name, race, sex, Company seniority date (or date of hire) of the employee selected for the position; (3) current rosters showing the name, race, sex, job title, and department for the supervisory personnel at each facility; (4) the name, race, sex,

job title, department, and facility of each black or female supervisory employee terminated or demoted during the reporting period, and the reason for the termination or demotion (e.g., dismissal, retirement, etc.).

B. T.W.I.U. bargaining unit positions: (1) a listing of all job vacancies, by job title, department, and facility which have occurred since the last report; (2) the name, race, sex, Company seniority date, job classification, department, and facility of each employee who bid on the vacant job; (3) the name, employee identification number, race, sex, Company seniority date, job classification, department, and facility of the employee awarded the job; (4) the name, race, sex, Company seniority date, job classification, department, and facility of every black or female employee who was demoted, laid off, or terminated during the last reporting period and the reason for the action.

C. Such reports shall be submitted until March 15, 1976; a similar report shall be submitted on March 15, 1977, after which time the Court shall divest itself of jurisdiction over this matter unless, prior to that date, on application of any party, jurisdiction is extended.

2. No later than thirty (30) days after the selection of the jobs in the Richmond and Virginia Branches required by Section II, *supra*, the defendants shall submit to this Court, with copies to counsel for plaintiffs, the following:

A. The name, race, sex, employee identification number, Company seniority date, wage rate, prior and current job classification, department, and facility of each employee who is displaced as a result of the procedure set forth in Section II, *supra*.

B. The name, employee identification number, race, sex,

Company seniority date, job classification, and facility of each member of Class I and Class II who has (1) elected not to bid on any position; (2) bid and moved to another position (or positions), including the title of the new position(s); (3) bid on a position which he was not awarded because of insufficient seniority; or (4) executed a copy of the form attached hereto as Exhibit B. [See attached sheet.]

C. All personnel records, union membership lists, bid sheets, seniority rosters, and other data used in preparing the reports required by this Section, shall be maintained by the defendants at their usual places of business and shall, upon reasonable notice, be made available to counsel for plaintiffs for inspection or copying, together with any other data necessary to evaluate the performance of the defendants under this Decree. Such records shall be maintained and preserved for the duration of this Decree.

/s/
United States District Judge

Alexandria, Virginia
December 31st, 1974

EXHIBIT A

WAIVER OF JOB SELECTION OPPORTUNITY

I hereby acknowledge that the American Tobacco Company has given me the opportunity to select any job to which my seniority would entitle me at the Richmond and Virginia Branches in accordance with the Decree entered on ..... in the cases of *John Patterson, et al.*, v. *The American Tobacco Co., et al., and Equal Employment Opportunity Commission* v. *American Brands, Inc., et al.* I have elected not to exercise such opportunity and hereby waive the right of selection given by the said Decree.

.....

Employee

Witness: .....

Dated: .....

EXHIBIT B

REQUEST FOR OPPORTUNITY TO TRANSFER

I hereby request that I be given the opportunity to transfer from the Richmond/Virginia Branch of the American Tobacco Company to the Richmond/Virginia Branch should a vacancy occur at said Branch for which I am the most senior bidder pursuant to the Decree entered on ....., in the cases of *John Patterson, et al.* v. *The American Tobacco Company, et al.*, and *Equal Employment Opportunity Commission* v. *American Brands, Inc., et al.*

.....

Employee

Dated: .....

Company Acknowledgement: .....

Opinion of the Court of Appeals on Initial Appeal ("Patterson I")

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1259

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH, and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated,

Appellees,

—v—

THE AMERICAN TOBACCO COMPANY, a Division of American Brands, Incorporated,

Appellant.

No. 75-1260

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH, and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated,

Appellees,

—v—

Tobacco Workers' International Union, an unincorporated association; Local 182, Tobacco Workers' International Union, an unincorporated association,

Appellants.

Opinion of the Court of Appeals on Initial Appeal ("Patterson I")

No. 75-1261

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH, and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated,

Appellants,

—v—

THE AMERICAN TOBACCO COMPANY, a Division of American Brands, Incorporated; Tobacco Workers' International Union, an unincorporated association; Local 182, Tobacco Workers' International Union, an unincorporated association,

Appellees.

No. 75-1262

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellee,

—v—

Local 182, Tobacco Workers' International Union (AFL-CIO),

Appellant.

No. 75-1263

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellee,

—v—

AMERICAN BRANDS, INC., d/b/a American Tobacco Company, Inc.,

Appellant.

Opinion of the Court of Appeals on Initial Appeal ("Patterson I")

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Albert V. Bryan, Jr., District Judge.

Argued May 7, 1975. Decided Feb. 23, 1976

Before WINTER, BUTZNER, and WIDENER, Circuit Judges.

Henry L. Marsh, III; (S. W. Tucker; John W. Scott, Jr.; Randall G. Johnson; Hill, Tucker and Marsh; Jack Greenberg; Elaine R. Jones; Barry L. Goldstein; and Morris J. Baller on brief) for John Patterson, et al.; Henry T. Wickham (John F. Kay, Jr.; Kenneth V. Farino; Mays, Valentine, Davenport and Moore; Chadbourne, Parke, Whiteside and Wolff; Paul G. Pennoyer, Jr.; Arnold Henson; Bernard W. McCarthy; and Bernard J. Dushman on brief) for The American Tobacco Company and American Brands, Incorporated; Herbert L. Segal (Irwin H. Cutler, Jr.; Walter Lapp Sales; Segal, Isenberg, Sales and Stewart; Jay J. Levit; Stallard and Levit; and James F. Carroll on brief for Tobacco Workers' International Union and Local 182); Margaret C. Poles, Attorney, Equal Employment Opportunity Commission, (Julia P. Cooper, General Counsel; Joseph T. Eddins, Associate General Counsel; and Beatrice Rosenberg and Charles L. Reischel, Attorneys, on brief) for the Equal Employment Opportunity Commission.

BUTZNER, Circuit Judge:

These appeals and cross appeals question certain provisions of a judgment entered in consolidated actions brought by the Equal Employment Opportunity Commis-

sion and several black employees of the American Tobacco Co. against the company, the Tobacco Workers International Union, and its Local 182. The case concerns the application of Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e et seq.] and 42 U.S.C. § 1981 to redress race and sex discrimination in working conditions.[1] Following is a summary of the district court's decision and our disposition of the assignments of error:

I. The district court defined the class of black employees as those, whether currently employed or not, who worked on or after July 2, 1965, the date Title VII became effective. It found no discrimination in hiring but ruled that the company and the labor organizations had engaged in unlawful employment practices by racial discrimination in the promotion of employees. It ordered American to institute company-wide seniority, eliminate certain lines of progression from lower to higher paying jobs, post definite job descriptions, grant back pay, and adjust pensions and profit sharing plans in amounts to be determined at a subsequent hearing. The court also ordered that white incumbents be bumped from jobs for which senior black employees were qualified.

Neither party has assigned error to the court's finding of no discrimination in hiring. We find no error in the designation of the class. We affirm the finding of discrimination in promotions and approve the relief ordered by the court, except for provisions of the judgment dealing with company-wide seniority and bumping.

---

[1] 42 U.S.C. § 2000e2 [*sic*] prohibits both employers and labor organizations from engaging in employment practices that discriminate on the basis of race or sex.

42 U.S.C. § 1981 assures all persons the same right to make and enforce contracts as is enjoyed by white citizens.

II. The district court ruled that the EEOC was empowered to bring suit to eliminate discrimination against women, although the initial charge dealt only with discrimination against men. It defined the class of aggrieved women in terms similar to those used to describe the class of black employees. The court found discrimination in promotions but not in hiring, and it ordered relief similar to that afforded black employees.

On these issues we affirm the district court, modifying only its grant of relief.

III. The district court found discrimination in the selection of supervisors and ordered the company to prepare written job descriptions and objective criteria for appointments. It also ordered preferential hiring of blacks and women to fill supervisory vacancies.

We affirm these aspects of the court's judgment except for those dealing with preferential hiring.

IV. The district court held that the actions were timely filed, that the statute of limitations for an action brought under § 1981 is five years, and that the statute is not tolled by filing a charge with the EEOC. It also held that back pay for discrimination against women should accrue from two years before the charge was filed.

Except for the application of the five-year statute of limitations and the accrual of liability for the women's back pay, we affirm these rulings. The proper limitation, we hold, is two years, and the accrual date for back pay must be reexamined in light of EEOC v. General Electric Co., —— F.2d ——, No. 74-1974 (4th Cir. 1975), which was decided after the district court wrote its opinion.

Opinion of the Court of Appeals on Initial Appeal ("Patterson I")

I

American operates three facilities in Richmond, Virginia. The "Virginia Branch" makes cigarettes; the "Richmond Branch" makes pipe tobacco; and the "Richmond Office" keeps accounts and records for both branches. Approximately 250 of the 1,280 employees at both branches are black, and in the Richmond office 13 of the 62 employees are black. In each branch the prefabrication department blends and prepares tobacco before sending it to the fabrication department, which manufactures the finished products. Workers in prefabrication generally earn less than those in fabrication, and most employees at the Richmond branch make less than those at the Virginia branch.

Before 1963 the union and the company overtly segregated employees by race with respect to job assignments, cafeterias, restrooms, lockers, and plant entrances. White employees were represented by Local 182 of the Tobacco Workers International Union, while black employees were represented by Local 216. Blacks were generally assigned to positions in the prefabrication departments. The higher paying jobs in fabrication were largely reserved for white employees. Each department had its own seniority roster, on which promotions depended. Employees could not transfer from one department to another without forfeiting their seniority.

In September 1963 the black union was assimilated by the white Local 182 to comply with an executive order relating to the government's purchase of supplies. Simultaneously, the company abolished departmental seniority, but it continued to maintain separate rosters at the two branches. The 1963 changes did not eliminate racial discrimination from the company's promotion practices. The

district court found that until 1968 the company utilized a system of unwritten qualifications which denied black employees access to the higher paying jobs at the Virginia branch. For certain positions an employee had to be familiar with the duties of the new job in the opinion of his supervisor. Also, he had to work a minimum number of hours on a temporary basis to qualify as an operator of a making or packing machine. Consequently, black employees not working in proximity to the higher paying jobs had limited opportunity to qualify, regardless of their seniority. Combined with static employment in the tobacco industry, this system allowed little advancement of black employees from jobs in prefabrication to those in fabrication. Indeed, from 1963 to 1968 there was an increase of only four blacks in the fabrication department at the Virginia branch.

The Richmond branch had no qualification restrictions on promotions. Instead, supervisors canvassed employees, seeking the senior worker willing to fill a vacancy. There were, however, no written job descriptions. This system provided slight opportunity for black employees to move from prefabrication to fabrication, and from 1963 to 1968, there was an increase of only six black employees in the latter department. As of 1968, only three of the 26 machine operators were black.

In January 1968 the company discontinued its qualifications system. Instead, it posted vacancies and promoted the senior employee who bid for the job. The district court found that this innovation was "facially fair and neutral" but ordered that it be implemented by posting written job descriptions. Furthermore, the district court found that access to certain jobs was barred to black em-

ployees by lines of progression and the maintenance of separate seniority rosters for each branch.

Although the company and the union have taken steps in recent years to correct some of the inequalities of the past, the lines of progression, the lack of definite written job descriptions, and barriers to transfer between the branches remain impediments to fair and neutral employment practices. Much must still be done to eradicate any taint of racial discrimination at the plant. The most recent figures available indicate that as of the end of 1973, more than 80 percent of all the employees in the Virginia branch's prefabrication department were black, while in the fabrication department only about 14 percent were black. At the Richmond branch, black employees' penetration into the fabrication department was greater, with blacks comprising more than 38 percent of the workforce. But the lower paying prefabrication department remained almost completely segregated; 92 percent of its employees were black. These figures provide ample support for the district court's findings that "[t]raditionally, at both branches there have been more blacks in the prefabrication department than whites, and more whites in the fabrication department than blacks."

The company emphasizes that from July 2, 1964, to March 1, 1974, 25 percent of all employees promoted and 20 percent of those advanced to operate automatic machinery at the Virginia branch were black. Also, since the initiation in January 1968 of the posting and bidding procedure, 51.5 percent of the successful bidders have been black. These gross figures, however, include promotions in both prefabrication and fabrication departments, and, while laudable, they do not address the crucial issue of the case —the entry of black employees into the historically white

fabrication department. Apart from the fact that many of these promotions were made after charges were filed with the EEOC, the company's reliance on the overall promotion rate in both departments misses the mark because blacks have always been promoted in the historically black prefabrication department. Moreover, as late as 1973, of the approximately 200 hourly-paid, non-craft job classifications at Virginia, 18 had never been held by whites and 10 had never been held by blacks. Even more rigid segregation characterized the Richmond branch; of the approximately 43 hourly-paid, non-craft job classifications, 21 had never been held by whites and nine had never been held by blacks.

We conclude, therefore, that the record amply supports the district court's finding that after the effective date of Title VII the company and the union discriminated in the promotional policies of their bargaining agreements and practices. Tested by familiar standards, the court's findings must be sustained.[2]

We next consider the assignments of error that challenge the relief ordered by the district court. The directive that definite job descriptions must be provided in order to implement a fair method of promotion was clearly warranted. *Cf.* Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972).

In those jobs that were filled according to lines of progression, an employee had to work in the first job before proceeding to the next, and so on up to the highest job in the line. Most of these jobs were in the fabrication departments. Since black employees had been largely ex-

[2] Federal Rule of Civil Procedure 52(a) provides in part that "[f]indings of fact [by the court] shall not be set aside unless clearly erroneous . . ."

cluded from the fabrication departments, they held few jobs in most of these lines and could not advance despite their seniority. In this respect, the lines of progression perpetuated the effects of past discrimination in a manner similar to the formerly segregated departmental seniority rosters. On the basis of its evaluation of conflicting expert testimony, the district court held that only three of the nine lines are justified by business necessity.[8] For the others, alternative means such as on-the-job training are available to provide competent workers.

Addressing the discrimination caused by lines of progression, we pointed out in Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir. 1971), that the vagaries of chance inherent in this promotion system might bar a qualified worker from advancement for years, although he could learn to perform the job competently in a relatively short time. To deal with such situations, we formulated the following standard for ascertaining whether a condition of employment was justified by business necessity:

> "[T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." 444 F.2d at 798.

[8] The three positions for which lines of progression can be maintained are adjuster, overhaul adjuster and adjuster prefabrication.

Measured by this test, the district court's elimination of the six lines of progression was correct.

The district court also ordered a single seniority roster for the Virginia and Richmond branches to enable employees in each branch to bid for posted jobs in the other. The order is designed to correct the present effect of past discrimination, which denied black employees entry into the higher paying jobs of the fabrication departments, particularly at the Virginia branch. For example, under the present method of job assignments, a black employee hired in 1955 at the Richmond branch prefabrication department has no realistic opportunity to secure a higher paying job in the formerly white Virginia fabrication department because he cannot transfer his company seniority to the Virginia branch. If he seeks a new job there, he must forfeit his seniority and start as a new hire.

The district court correctly found that the denial of transfer between the branches without retention of company seniority perpetuates the effect of past discrimination. We believe, however, that the relief ordered by the district judge is broader than necessary. Title VII does not require the company or the union to forego the benefits of separate, nondiscriminatory seniority rosters. "Application of the Act normally involves two steps. First, identification of the employees who are victims of discrimination, and second, prescription of a remedy to correct the violation disclosed by the first step. The Act does not require the application of the remedy to employees who are not subject to discrimination." United States v. Chesapeake and Ohio Ry., 471 F.2d 582, 593 (4th Cir. 1972). The only employees who suffered discrimination were blacks who could not obtain jobs in the fabrication departments because of their

race. Consequently, they are the only employees who should be allowed to transfer under the posting and bidding system from one branch to the fabrication department in the other branch on the basis of their company seniority. Black employees need not be allowed to transfer with company seniority to jobs in prefabrication, because they were never barred from these jobs in the first place. Similarly, white employees seeking transfers are not entitled to utilize company seniority, because they were never barred from fabrication departments. Finally, no employee hired after the cessation of discrimination in job assignments need be allowed to transfer with seniority intact. *See, e.g.,* Russell v. American Tobacco Company, —— F.2d ——, No. 74-1650 (4th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968).

The company and the union assert that this case is distinguishable from departmental seniority cases like *Robinson* because the Richmond and Virginia branches are in different locations. They emphasize that the branches make different products, have different managements, hire separately, and are some distance apart. For these reasons, they argue, the case falls within 42 U.S.C. § 2000e-2(h), which provides that:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ."

Opinion of the Court of Appeals on Initial Appeal ("Patterson I")

Noting that neither the Act nor the regulations define the statutory term "employees who work in different locations," we recently construed § 2000e-2(h) in Russell v. American Tobacco Co., —— F.2d ——, No. 74-1650 (4th Cir. 1975). We pointed out that the labor market is the most important factor in determining whether a company's employees work in different locations. A company operating two or more of its plants with employees who are from the same geographic area and who are unskilled or possess the same skills can assign an applicant to an entry level position in either plant. Therefore, employees the company hired from the same labor market would not generally fall within the statutory class of "employees who work in different locations."

On the other hand, even though a company's plants are in the same city, as they are here, their proximity does not conclusively show that they are in the same location. If one plant requires labor possessing skills different from those of workers at another plant, the company cannot draw from the same labor market to man its plants. Under these circumstances, employees would work at different locations, even though they reside and work in the same geographic area.

American hires employees for both branches from the same labor market. The branches are only a few city blocks apart. There are entry level jobs at both places that require neither particular skills nor experience, and jobs in fabrication can be filled just as well by transferees as by persons hired off the street.

Other facts support the district court's finding that these plants are not in different locations. The same bargaining agreement covers employees at both plants, and the

company has contractually reserved the right to shift employees from one plant to the other without depriving them of seniority. The Richmond office, located in a building at the Virginia branch, serves both branches, and the Virginia branch ships the Richmond branch's products.

There is another reason why the exemption granted in § 2000e-2(h) is not available to American. As we noted in *Russell, supra,* slip op. at 10, that section contains a proviso that restricts its application to situations where differences in the conditions of employment "are not the result of an intention to discriminate." Past intentional segregation that is perpetuated by a company's seniority system precludes it from claiming that its system is bona fide within the meaning of § 2000e-2(h), Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971). Similarly, "where present differences in working conditions are remnants of past intentional discrimination, the proviso of § 2000e-2(h) bars a company from defending its employment practices on the ground that its employees work in different locations." Russell v. American Tobacco Co., —— F.2d ——, ——, No. 74-1650 (4th Cir. 1975), slip op. at 11.

We therefore affirm the district court on this issue but note that on remand it should vacate the provision of its judgment requiring a single seniority roster for both branches. It should substitute an order allowing those black employees who formerly could not obtain jobs in the fabrication departments because of discrimination to utilize their company seniority to bid for such jobs in the fabrication department of either branch. Of course, an employee who transfers must have the capacity to perform the job after receiving a reasonable amount of training.

The company and the union also assign error to the

part of the district court's order that allowed senior black and female employees to bump junior employees from preferred jobs. The court ordered immediate company-wide posting and bidding on each non-supervisory job in the Richmond and Virginia branches. The only qualifications for advancement were to be seniority and a willingness to learn the job. To facilitate the bidding, the court ordered that job descriptions be posted. It further provided that employees who were displaced by senior black or female workers, and therefore had to move to lower paying jobs, must be paid as much as they were in their former jobs. The court explained the reason for this provision of its decree as follows:

> "The present system of posting and bidding adopted in 1968 is fair, although it needs, in the Court's view, further implementation. As indicated in the findings of fact, however, black and female employees in the Richmond Branch and the Virginia Branch have been locked in their jobs as a result of prior discriminatory practices. This is because of the static condition of the tobacco industry generally, and American in particular, and the advent of automation, both of which have limited opportunities for upward movement of present employees and for new hiring." (Appendix at 37-38.)

The court's description of the lack of employment opportunities is well supported by the evidence. No new employees were hired to fill jobs under jurisdiction of the union from September 12, 1955, through June 12, 1964, in the Richmond branch and May 12, 1966, in the Virginia branch. Employment in both branches decreased from 1953 to 1973 by approximately 1300 workers.

One of the early questions about the construction of

Opinion of the Court of Appeals on Initial Appeal ("Patterson I")

Title VII was whether "present consequences of past discrimination [are] covered by the act." Quarles v. Philip Morris, Inc., 279 F.Supp. 505, 510 (E.D. Va. 1968). The generally accepted answer is a qualified "yes": employers and unions using pre-Act discriminatory practices to bar employees from filling post-Act vacancies violate the Act. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); *Quarles, supra.* On the other hand, Title VII has not been construed to impose a duty to demote incumbents. In Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), the court rejected the contention that "allowing junior whites to continue in their jobs constitutes an act of discrimination." Judge Wisdom, writing for the court, said:

> "The Act should be construed to prohibit the *future awarding* of vacant jobs on the basis of a seniority system that 'locks in' prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation." 416 F.2d at 988.

Every appellate court to whom the issue has been presented has accepted this interpretation.[4] Equally important, when Congress was considering the 1972 amendments to Title VII, it approvingly noted *Papermakers'* construction of the Act.[5]

---

[4] *E.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); United States v. N. L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); United States v. Chesapeake & Ohio Ry., 471 F.2d 582 (4th Cir. 1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

[5] The section-by-section analysis of the House bill states that "it was assumed that the present case law as developed by the courts

These precedents cannot be satisfactorily distinguished on the ground that bumping would be required only when the proof discloses a static industry that has few vacancies. The difference between static and dynamic industries is not always readily ascertainable because employment opportunities fluctuate for many reasons over long and short periods. Requiring bumping for static industries while denying it in dynamic industries would introduce into the administration of the Act countless variables for which Congress has made no provision.

Since the Act should not be applied retroactively,[6] it is, of course, much easier to justify the retention of incumbents who obtained their positions before the effective date of the Act than the retention of those who were unlawfully preferred after this date. Nevertheless, neither Congress nor the EEOC nor the courts have drawn a distinction between pre-Act and post-Act incumbents. The reasons for applying the Act uniformly are largely pragmatic. The enactment of Title VII was the result of many concessions, including the unequivocal assertion by proponents of the legislation that it was not intended to be used to displace incumbent workers.[7] A primary goal of Title VII is to

---

would continue to govern the applicability and construction of Title VII." Legislative History of Equal Employment Opportunity Act of 1972, Government Printing Office (1972) at 1844. *Papermakers*, of course, was a prominent part of that case law.

[6] This principle is established by the legislative history. Senators Clark and Case, two of the bill's sponsors, circulated an interpretative memorandum stating that Title VII's operation was "prospective and not retrospective . . . (T)he employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis." 110 Cong. Rec. 6992 (daily ed. April 8, 1964), quoted in Quarles v. Philip Morris, Inc., 279 F.Supp. 505, 516 (E.D. Va. 1968).

[7] The Clark-Case memorandum, note 6 *supra*, states that an employer "would not be obliged—or, indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies,

induce voluntary compliance by employers and unions. Section 2000e-5; *see* EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 948 (8th Cir. 1974). Demoting employees, especially those who are not responsible for wrongdoing, undoubtedly would encounter more resistance than deferring their future expectancies. As this case illustrates, bumping is an unsettling process. Its domino effect adversely affects employees who have done no wrong and who, indeed, may have been the victims of discrimination.[8]

The effects of bumping are exacerbated by another aspect of Title VII. The Act does not provide a definitive catalogue of unlawful employment practices. Congress placed this responsibility on the EEOC and, ultimately, the courts. It soon became obvious that overt discrimination is not the only obstacle to equal employment opportunity.[9] As a result of litigation, many "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" have been exposed as discriminatory and condemned. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971); United States v. Dillon Supply Co., 429

---

or, once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier." 110 Cong. Rec. 6992 (daily ed. April 8, 1964).

[8] As part of its compliance with the district court's decree, American conducted a canvass of its employees to determine the effect of bumping. The results of that survey are contained in a report filed with this court to supplement the record. The report showed that 40 employees requested jobs to which their plant-wide seniority would entitle them. One of these has already obtained the job he requested. The others would bump eight white male employees and 31 minority employees out of the jobs they now occupy. We stayed the provision of the decree that required bumping pending this appeal.

[9] *See generally* Introduction, The Second Decade of Title VII: Refinement of the Remedies, 16 Wm. & Mary L. Rev. 433, 436-37 (1975).

F.2d 800, 804 (4th Cir. 1970). There is no reason to suppose that this process will soon abate. Bumping could mean that employers and workers would likely have their businesses and their working lives rearranged by court decrees from time to time, as various unlawful employment practices are identified. *See generally* Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv. L. Rev. 1260, 1274-75 (1967).

Finally, although Congress did not intend the Act to be used as a vehicle for displacing incumbents, it did not leave the victims of discrimination without a remedy. Section 2000e-5(g) expressly authorizes a district court to award them back pay. While an employee who has been unlawfully denied a promotion must await a vacancy before advancing, he need not prove that a vacancy exists in order to qualify for back pay. Hairston v. McLean Trucking Co., 520 F.2d 226 (4th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971).

In Albemarle Paper Co. v. Moody, 422 U.S. 405, 408 (1975), the Court explained the standards a district court should follow in awarding back pay to employees who "have lost the opportunity to earn wages because an employer has engaged in an unlawful discriminatory employment practice." The Court said that the back pay provision must be applied in a manner that is "consonant with the twin statutory objectives" of "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421.

To satisfy these objectives, back pay must be allowed an employee from the time he is unlawfully denied a promotion, subject to the applicable statute of limitations, until he actually receives it. Some employees who have been victims of discrimination will be unable to move im-

mediately into jobs to which their seniority and ability entitle them. The back pay award should be fashioned to compensate them until they can obtain a job commensurate with their status. This may be accomplished by allowing back pay for a period commencing at the time the employee was unlawfully denied a position until the date of judgment, subject to the applicable statute of limitations. This compensation should be supplemented by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position. *See* Bush v. Lone Star Steel Co., 373 F.Supp. 526, 538 (E.D. Tex. 1974); United States v. United States Steel Corp., 371 F.Supp. 1045, 1060 n. 38 (N.D. Ala. 1973).[10] Alternatively, the court may exercise continuing jurisdiction over the case and make periodic back pay awards until the workers are promoted to the jobs their seniority and qualifications merit. Or perhaps counsel and the court can devise some other convenient method of taking all the effects of past discrimination into account. In any event, the compensation must include, as the district court properly noted, increments for pensions and profit sharing.

Compensatory pay and adjustment of benefits provide monetary relief for discrimination against minority employees but do not afford the satisfaction that comes from being promoted to a more responsible job. Nevertheless, such an intangible benefit does not justify injunctive relief

[10] This measure of compensation is analogous to that awarded in an ordinary tort case, where compensation is assessed for one's loss of earnings whether the loss occurs before or after the judgment is entered. The analogy is apt because a statutory action attacking racial discrimination is fundamentally for the redress of a tort. *See* Curtis v. Loether, 415 U.S. 189, 195 (1974).

mandating bumping. Weighed against a minority employee's sense of achievement are the harm that demotion will cause to incumbents who have done no wrong and the disruption of the company's business that bumping entails. The survey of employees referred to in footnote 8, *supra*, indicates that 39 minority employees are seeking jobs held by 8 white men and 31 other minority employees. This survey, however, does not prove that the employees seeking different jobs were motivated even in part by non-monetary factors, for it was conducted on the assumption that bumping was the only way they could receive better pay and fringe benefits. Since full monetary compensation and the removal of barriers to promotion provide adequate relief to minority employees without disruption to other employees and management, we conclude that neither Title VII nor its legislative history requires bumping in this case.

Relief under § 1981 is limited to correcting racial discrimination. *See* Delavigne v. Delavigne, No. 75-2203, —— F.2d —— (4th Cir. 1976); Willingham v. Macon Telegraph Publishing Co., 482 F.2d 535, 537 n. 1 (5th Cir. 1973). But apart from this, Title VII and § 1981 provide complementary remedies for employment discrimination, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975). Although the legislative history of Title VII cannot support a decision that bumping relief is unavailable under § 1981, the pragmatic considerations we advance apply with equal force to the § 1981 claim. Moreover, "in fashioning a substantive body of law under § 1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under Title VII for direction." Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309, 1316 (7th Cir.

1974). For these reasons, we hold that bumping relief is not available to American's black employees under § 1981.

On remand, therefore, the district court should modify its decree to eliminate bumping, but it should take steps to assure that back pay will be computed to include compensation for the entire time that a minority employee is denied a promotion for which he or she is qualified by seniority and ability.

We affirm the district court's award of relief against both the local and the International, except as noted in Part II. The local acquiesced without protest in the lines of progression. Not until 1968 did it negotiate for the removal of the qualification requirements for promotion. In 1968, 1971, and 1974, it proposed a company-wide seniority system that would have allowed transfers between branches. When the company declined, the union settled for assurances of indemnity that would protect its treasury against the claims of its members.

A union may not bargain away minority employees' rights to equal treatment, *see* Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir. 1971), and, indeed, it must "negotiate actively for nondiscriminatory treatment" of its minority workers. Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 989 (D.C. Cir. 1973); *see also* United States v. N. L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973). The Supreme Court has recently emphasized the duty a union owes to its minority members by pointing out that one of the purposes of a back pay award is to spur unions, as well as employers, to evaluate employment practices and eliminate unlawful discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975). Tested by these principles, the district court's imposition of liability

on both the local and the International was warranted by the law and the facts.

Nor can we accept the International's argument that it should not be held liable because it was not responsible for the contracts negotiated by the local. The evidence disclosed that a vice president of the International acted as an "advisor" to the local, playing an active role as the president's deputy in the 1971 and 1974 negotiations for bargaining agreements. Moreover, the constitution of the International provides:

> "It shall be the principal duty of the Local Union to secure satisfactory collective bargaining and working agreements showing an adequate minimum wage and fair working conditions for workers who have become affiliated with the TWIU, provided, however, that no collective bargaining and working agreement shall be consummated until first submitted to the general president who may approve or reject any proposed agreement, and no such agreement can be executed without the approval of the general president or his deputy."

The district court was not obliged to accept representations of the vice president that contradicted the plain meaning of this provision. The court properly concluded that the International's approval of the bargaining agreement pursuant to this provision made it jointly responsible with the local. Cases dealing with an international union's exoneration of liability to an employer are inapposite where its duties to members of its local unions are at issue.

II

The EEOC's complaint contains allegations of discrimination against women employees. The company contends

that the commission lacked authority to press this claim because no female employee filed a charge. On the contrary, the company points out, the only charge of sex discrimination was filed by a male employee. The district court overruled the company's motion to dismiss this aspect of the case, holding that the commission could institute the suit if its investigation of the male employee's complaint disclosed discrimination against women.

We affirm the district court. We recently decided this issue adversely to the company's position in EEOC v. General Electric Co., —— F.2d ——, No. 74-1974 (4th Cir. 1975). The company's argument does not persuade us to depart from the conclusions reached in that case.[11]

On the merits of the claim of sex discrimination, we uphold the district court's finding of liability. Because the company's discrimination against women bears many similarities to its discrimination against black employees, we need not recite the evidence in detail. It is sufficient to note that for many years the company overtly segregated jobs by sex, discriminating against women, as the district court found, "with respect to wage structure, departments, seniority and hiring." Even after these practices were nominally eliminated in 1963, their discriminatory effect was perpetuated by lack of definite job descriptions, lines of progression, and obstacles to transfers. The court found that as recently as 1973, 23 of the approximately 200 non-craft, hourly-paid jobs at the Virginia branch had not been held by women, and six had not been held by men. At the Richmond branch, 32 of the 43 non-craft, hourly-paid jobs had not been held by women, and six had not been held by men. The company has not demonstrated that these segre-

[11] *See* Part IV *infra* for a discussion of the statute of limitations with respect to this issue.

gated positions cannot be filled by persons of the opposite sex. The court also found that from 1967 through 1972 women had a lower mean income than men with comparable seniority.

Again, the district court's findings are supported by the evidence and cannot be set aside as clearly erroneous. The relief the court afforded women is essentially the same as the relief it granted black employees. Accordingly, we approve the relief for women employees, subject, however, to the same modifications of the court's decree that we mentioned in Part I. This relief, however, can be granted only against the company. The complaint against the union for sex discrimination must be dismissed for reasons we will next discuss.

The commission's complaint names the company and Local 182 as defendants. The commission acknowledged that it had not attempted to conciliate the charges with the union before filing suit. While the suit was pending, it made an offer to conciliate, which the union accepted. In the course of discussion with the union, however, the commission's representative conceded that he had no authority to settle the suit. Understandably, the conciliation efforts were unsuccessful. The district court, viewing the lapse as technical, held that the belated offer to conciliate and its acceptance substantially complied with the Act.

The Act requires, however, that after receiving a charge and before bringing a suit the commission must take four steps: serve the charge on the employer and labor organization, investigate the charge, determine that reasonable cause exists to believe the charge is true, and endeavor to eliminate alleged unlawful employment practices "by informal methods of conference, conciliation, and persua-

sion."[13] The 1972 amendments to Title VII empowered the commission to sue if it is unable to secure an acceptable conciliation agreement.[13] This provision of the Act has been construed to create an express condition on the commission's power to sue. Consequently, a suit brought by the commission before attempting conciliation is premature. EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 947-48 (8th Cir. 1974); EEOC v. E. I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1333-34 (D. Del. 1974); EEOC v. Westvaco Corp., 372 F.Supp. 985, 991-93 (D. Md. 1974).[14]

We recently emphasized that the commission's statutory duty to attempt conciliation is among its most essential functions.[15] It is particularly important for the commission to attempt conciliation with a union when investigation discloses that provisions of a bargaining agreement concerning seniority and job assignments are causing the alleged unfair employment practices. Then the employees who enjoy majority status are frequently more directly affected than their employer by changes that will advance minority employees. In such cases, the success of conciliation often hinges on the union's response.

We do not rule out the possibility that exceptional circumstances may excuse a failure to attempt conciliation, but

---

[13] 42 U.S.C. § 2000e-5(b).

[13] 42 U.S.C. § 2000e-5(f)(1).

[14] We have held that the commission's failure to attempt conciliation is not a jurisdictional bar to an employee's action, because the employee cannot be charged with the commission's failure to execute its statutory duties. Russell v. American Tobacco Co., —— F.2d ——, ——, No. 74-1650 (4th Cir. 1975); Johnson v. Seaboard Air Line R.R., 405 F.2d 645 (4th Cir. 1968). These cases, however, are inapposite where the commission's power to sue is in question.

[15] EEOC v. Raymond Metal Products Co., —— F.2d ——, ——, No. 75-1007 (4th Cir. 1976).

that is not the case here. The union's willingness to negotiate even after suit was brought tends to negate any suggestion that timely conciliation of the sex discrimination charges would have been unsuccessful. When it became apparent that the commission's representative lacked authority to settle the case, the possibility of conciliation was dealt a severe blow by the very circumstances Congress sought to avoid—commencement of a civil action before attempting conciliation. Accordingly, we conclude that the district court should have dismissed the part of the commission's complaint which alleges that Local 182 caused the company to discriminate unlawfully on the basis of sex.

III

The district court also found that the company had engaged in race and sex discrimination in appointing supervisors. The evidence supports this finding. At both the Richmond and Virginia branches, the entry level position for supervisory personnel is assistant foreman. The company fills about 34 percent of the vacancies in this position by promoting hourly employees; it fills the balance by hiring new applicants. With no formal, objective, written standards for appointment, the company relies in part on recommendations from the union, which also lacks objective standards. Until 1963 the company appointed only white males to supervisory posts, and the enactment of Title VII failed to effect any immediate change in this policy. At the Richmond branch, the first black supervisor was appointed in 1966 and the second in 1971. As of June 1, 1973, there were only three, constituting 9.6 percent of the supervisory force of 31. In 1967 the company named its first female supervisor at the Richmond branch. By 1973 two (6 per-

cent) of the 31 supervisors were women. At the Virginia branch, a black employee was promoted to assistant foreman in 1963. In the next decade four more were appointed, so that by 1973 7.24 percent of the 69 supervisors were black. The first female was not appointed as a supervisor at this branch until 1972. Two more were appointed by June 1, 1973.

Before the trial of the case, neither a black employee nor a woman had ever been appointed to a supervisory position at the Richmond office. The court noted, however, that a vacancy existed, and the company proffered additional evidence that as of November 1, 1974, the Richmond office had one black supervisor and one white female supervisor on a staff of eight.

The district court enjoined the company from "implementing, maintaining, or giving effect to any criteria utilized for the selection of supervisory personnel which is designed to or has the effect of discriminating against black or female candidates for supervisory positions." It ordered the company to post job descriptions for these positions and to devise objective criteria for selecting new appointees. The propriety of these provisions of the court's decree is well settled. *See* Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1383 (4th Cir. 1972); Rowe v. General Motors Corp., 457 F.2d 348, 358-59 (5th Cir. 1972). We think, however, that on remand the court's decree should be enlarged to require the union to publish objective criteria for making its recommendations for supervisory appointments.

Finally, the district court ordered that vacancies in the assistant foreman, foreman, and office supervisory positions must be filled with qualified blacks and women, except

when none can be found, until the percentage of blacks and women equals the percentage of these classes of workers in the Richmond Standard Metropolitan Statistical Area (SMSA). The company's attack on this provision of the decree is two-pronged. First, it contends that Title VII condemns preferential hiring, especially when, as here, the preferences are absolute. It relies primarily on § 703(j) of the Act, 42 U.S.C. § 2000e-2(j), which provides in part:

> "Nothing contained in this subchapter shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group because of the race...[or] sex...of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race...[or] sex...employed...in comparison with the total number or percentage of persons of such race...[or] sex...in any community...or in the available work force in any community...."

This section plainly bans the use of preferential hiring to change a company's racial imbalance that cannot be attributed to unlawful discrimination. In Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971), the Court said:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

Uniformly, however, Title VII has been construed to authorize district courts to grant preferential relief as a remedy for unlawful discrimination. Rios v. Enterprise Association Steamfitters Local 638 of U.A., 501 F.2d 622, 628-31 (2d Cir. 1974); United States v. N. L. Industries, Inc., 479 F.2d 354, 377 (8th Cir. 1973); Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680, 683-86 (7th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544, 552-53 (9th Cir. 1971); United States v. International Brotherhood of Electrical Workers, Local No. 38, 428 F.2d 144, 149-51 (6th Cir. 1970); Local 53 of International Ass'n of Heat & Frost I. & A. Workers v. Vogler, 407 F.2d 1047, 1053-54 (5th Cir. 1969). This construction of the Act is in harmony with other cases which authorize preferential relief from unlawful employment discrimination in situations where Title VII is not applicable. Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9, 16-18 (1st Cir. 1973); Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir. 1971); Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 172, 176-77 (3d Cir. 1971). In all, eight circuits have approved some form of temporary preferential relief for discriminatory employment practices. *See* Sape, The Use of Numerical Quotas to Achieve Integration in Employment, 16 Wm. & Mary L. Rev. 481, 499 (1975). No court of appeals has ruled to the contrary, although there have been dissents.

We have not previously ruled on the issue, but in a case involving the Civil Rights Act of 1866 and the thirteenth and fourteenth amendments, we declined to impose quotas where the district court concluded that adequate relief could be obtained without their use. *See* Harper v. Klos-

ter, 486 F.2d 1134, 1136 (4th Cir. 1973). In view of the substantial precedent sanctioning preferential relief for unlawful discrimination, we reject the company's argument that Title VII forbids the remedy ordered by the district court. We recognize, however, that cases which approve such remedies caution that the necessity for preferential treatment should be carefully scrutinized and that such relief should be required only when there is a compelling need for it. *See* Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9, 17 (1st Cir. 1973). This brings us to the company's second reason for vacating the decree's provision for preferential appointment of supervisors.

The company argues that its appointment of black and female employees to supervisory positions already exceeds the ratio that preferential relief would require. Its argument rests on two premises. One, its conduct before the effective date of Title VII does not provide a proper base to measure its compliance with the Act; instead, it must be judged by the manner in which it filled vacancies after this date. Two, the district court erroneously considered the number of blacks and women in the Richmond SMSA workforce as a whole to ascertain a ratio of acceptable performance, instead of using only the blacks and women in the Richmond SMSA supervisory workforce.

We believe these premises are well founded. Title VII is not retroactive.[16] It does not provide a remedy for discrimination which occurred before it became effective in 1965. Robinson v. Lorillard Corp., 444 F.2d 791, 795 (4th Cir. 1971). At the Virginia branch 51 of the supervisors were appointed before Title VII prohibited discrimination

[16] The legislative history of Title VII indicates that it is not intended to be retroactive. *See* note 6 *supra.*

in their selection. They should not be counted in determining whether preferential hiring is required now. Between 1965 and 1973 the company appointed 18 assistant foremen, the entry level position for supervisors. Of that number, five (27.5 percent) were black and three (16.6 percent) were women. At the Richmond branch, 22 of the supervisors were appointed before Title VII became effective and nine afterwards. Of the nine, three (33.3 percent) were black and two (22 percent) were women. At the Richmond office, the evidence is not as clear. It has six entry level supervisory positions, which at the date of trial were filled by five white males with one vacancy. The district court found that four of the six positions had been filled after 1965. Subsequently, the company proffered evidence that it has promoted one black employee and one female to supervisory positions, constituting for each classification 16.6 percent of the appointments since 1965.[17]

The record discloses that 6.8 percent of the blacks and 1.5 percent of the women in the Richmond SMSA are placed in a category that includes supervisory personnel. Those percentages furnish a more realistic measure of the company's conduct than the gross percentage of blacks and women in the whole workforce, including unskilled labor. *See* Harper v. Mayor, 359 F.Supp. 1187, 1193 n.5 (D.Md), *aff'd sub nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973).

The fact that the company's appointments since 1965

---

[17] The district court declined to reopen the record to consider this proffer. Under the ratio that the court used for comparative purposes, the evidence had but slight probative effect. Its import, however, is magnified by acceptance of the company's premise that its performance since 1965 is what must be examined in determining whether it has violated the Act. On remand the court should reexamine the situation at the Richmond office.

exceed the ratio of qualified blacks and women in the workforce does not exonerate the company for the violations of the Act which the district court found. The tardy appointments of blacks and women to supervisory positions long after the passage of Title VII and the present lack of published job descriptions and objective selection procedures fully justify the injunctive relief the district court ordered. We believe, however, that the rate at which the company currently appoints blacks and women to supervisory positions is sufficient to show that there is no compelling need for the imposition of a quota.[18] *But see* Karst & Horowitz, Affirmative Action and Equal Protection, 60 Va. L. Rev. 955 (1974).

IV

The company contends that the charge filed with the EEOC on January 3, 1969, was not timely because there were no discriminatory practices at either branch after January 15, 1968. It argues that for this reason the action should be dismissed for failure to meet the jurisdictional requirement of a timely charge.[19] The district court, however, found that the discrimination was of a continuing nature and properly held that the charge was timely. Williams v. Norfolk & Western Ry., ____ F.2d ____, No.

[18] We do not mean to suggest that the company may use its percentage of black and female supervisors as a defense to future charges of discrimination against blacks and women. It must consider each application on its merits. If the company discriminates against a black or a woman, it can be called to account for violating Title VII, regardless of the percentage of blacks and women among its supervisors.

[19] Before the 1972 amendments to Title VII, a charge had to be filed with the EEOC within 90 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(d) (1964). In 1972, this period was changed to 180 days. 42 U.S.C. § 2000e-5(e).

74-1549 (4th Cir. 1975); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 994 (D.C. Cir. 1973); *see* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 467 n.13 (1975) (dictum).

The district court ruled that the filing of the charge in 1969 did not toll the statute of limitations for the § 1981 action which was filed in 1973. The Supreme Court recently confirmed the district court's correct understanding of the law. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

The district court applied the Virginia five-year statute of limitations to the § 1981 action. We have ruled, however, that the state's two-year statute applies to § 1982 actions. Allen v. Gifford, 462 F.2d 615 (4th Cir. 1972). Both § 1981 and § 1982 were enacted to redress infringements of closely related civil rights. We conclude, therefore, that the same two-year statute should apply to § 1981 actions. *Accord,* Revere v. Tidewater Telephone Co., No. 73-1390 (4th Cir., October 2, 1973) (unpublished opinion applying the two-year statute to a § 1981 action); *cf.* Almond v. Kent, 459 F.2d 200 (4th Cir. 1972). Accordingly, on remand, the two-year statute of limitations should be applied to the § 1981 claim. Of course, the point has little practical significance in this case in view of the fact that the § 1981 action was not tolled by the filing of the charge with the EEOC.

The district court ruled that back pay for sex discrimination should accrue from April 8, 1967, two years before the charge was filed with the EEOC. The two-year period mentioned by the district judge conforms with the statute.[20] However, this charge did not allege discrimination against women. Instead, this type of discrimination was initially

[20] 42 U.S.C. § 2000e-5(g).

disclosed by the EEOC's investigation.[21] Dealing with similar circumstances, we held in EEOC v. General Electric Co., —— F.2d ——, No. 74-1974, slip op. at 34-36 (4th Cir. 1975), that in the absence of countervailing equities a trial court should limit back pay to two years before the employer received notice of the results of the investigation. On remand the district court should reconsider its decree in light of this case.

The judgment is affirmed in part and modified in part, and the case is remanded for further proceedings consistent with this opinion.

WIDENER, Circuit Judge, concurring and dissenting:

I concur in large part with the opinion of the court for the reasons stated in the opinion. I differ, however, in some respects, and as to those I respectfully dissent.

So far as the opinion is based on *EEOC* v. *General Electric Company*, No. 74-1974 (4th Cir. 1975), I dissent for the reasons set forth in my dissent in that case, our judgment in which is not yet final. I should say, however, that this case may be a somewhat closer one than *General Electric* because here, at least, sex discrimination was the subject of the EEOC complaint, while in *General Electric* it was not. This case points up the importance of requiring the EEOC to comply with its own regulations as well as the statute. The union here is excused from liability for discrimination on account of sex because the statute was not complied with. The reason especially emphasized and held is that ". . . a suit brought by the commission before attempting conciliation is premature," p. 31, because " . . . the commission's statutory duty is to attempt conciliation is

[21] *See* Part II *supra.*

among its most essential functions." p.32. Despite the fact that both the company and the union were deprived of the first conciliation step as set forth in 29 CFR § 1601.19a, as well as the statutory benefits of conciliation attempts, the company is held to liability, while the union is not, although the liability was caused by the collective bargaining agreement signed by both the company and the union. Thus, I dissent not only from the finding against the company, but also from the disparate treatment awarded the company and the union on facts which are indistinguishable.

While the subject of collective bargaining agreements is at hand, I should say I have grave reservations about considering evidence in this type case of the respective positions taken by the company and the union in negotiations leading up to collective bargaining agreements when the agreement results in unlawful discrimination. This is tantamount to allowing a good faith defense disapproved by us in *Moody* v. *Albemarle Paper Company*, 474 F2 134 (4th Cir. 1973). (Modified on other grounds, 422 US 405 (1975). [*sic*]

The district court had only this to say about damages:

> "The formulation of the method of calculation and distribution of the back pay award and adjustment to the pension and profit-sharing plans will be complex—sufficiently so as to tax the ingenuity and good faith of counsel. In this regard counsel are directed to confer with a view to agreeing on a plan of calculation and distribution of the back pay award for submission to the Court—and, indeed, to explore the possibility of settling the monetary aspects of the case." App. p. 42.

With the opinion of the district court in mind, it is seen that the method of computing damages was not considered

by that court and is not properly before this court, *McGowan* v. *Gillenwater*, 429 F2 586 (4th Cir. 1970) [*sic*], so the detailed discussion of that subject is a dictum. If the district court, in ascertaining damages, adopts standards with which either side is in disagreement, either is at perfect liberty to appeal the award. Taking up the matter now, and especially its treatment in detail, when the matter is so "complex" as to "tax the ingenuity and good faith of counsel," and upon no record, is too great a departure from what I conceive to be the proper rule of courts expressing opinions only with reference to existing controversies. There is no controversy at this time between the parties about this matter, and an expression of opinion I think beyond the legitimate function of an appellate court. I express no opinion as to the correctness of the dictum.

We hold that the imposition of quotas for supervisory positions is error because the "rate at which the company currently appoints blacks and women to supervisory positions is sufficient to show that there is no compelling need for the imposition of a quota," and, then, in note 18, explain that the maintenance of a quota is not a defense to a charge of racial or sexual discrimination. In view of our holding and note 18 just referred to, I think we go out of our way just earlier in the opinion to justify the imposition of quotas in hypothetical cases.

Since quotas themselves are the rankest kind of discrimination and their application, if valid in any context, requires exaggerated facts not present here, that general subject would be better left for another day.

Senator Clark, one of the sponsors of the statute and one of the Senate floor managers, filed, in Legislative History, 3014, in response to objections made by opponents of the

legislation, a series of answers to the objections, among them the following (p. 3015):

> "Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.
>
> "Answer: Quotas are themselves discriminatory."

In view of the fact that the very existence of a quota is constitutionally suspect, the just quoted legislative interpretation of the statute, and our holding, such justification in hypothetical cases I think is out of place.

Order of the Supreme Court Denying Petitions for Certiorari

No. 76-46

THE AMERICAN TOBACCO COMPANY, ET AL,

Petitioners,

v.

JOHN PATTERSON, ET AL,

Respondents.

No. 76-56

TOBACCO WORKERS' INTERNATIONAL UNION, ET AL,

Petitioners,

v.

JOHN PATTERSON, ET AL,

Respondents.

November 1, 1976. Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit Denied.

Order of the District Court Denying Motions to Reconsider and Vacate Prior Findings of Liability

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

JOHN PATTERSON, ET AL,
Plaintiffs,

VS.

THE AMERICAN TOBACCO COMPANY, ET AL,
Defendants.

Civil Action No. 101-73-R

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Plaintiffs,

VS.

AMERICAN BRANDS, INC., ET AL,
Defendants.

Civil Action No. 104-73-R

ORDER

Defendants having moved to vacate this Court's Orders of January 7, 1977 and dismiss the Complaints in these cases, the Court, for the reasons stated in the Court's original opinion of September 25, 1974 and those stated from the bench on October 21, 1977, denies their motions.

Defendants based their motions on three recent opinions of the Supreme Court, *International Brotherhood of Teamsters* v. *United States,* 97 S.Ct. 1843 (1977); *United Airlines* v. *Evans* 97 S.Ct. 1885 (1977); and, *Hazewood* [sic]

School District v. *United States*, 97 S.Ct. 2736 (1977). For the reasons stated below I find that the Supreme Court's rulings in these cased [sic] do not warrant the dismissal of the Complaints or the vacating of the January 7, 1977 Order on Guidelines for Back Pay Proceedings. The post January 15, 1968 seniority system of the defendants in this case is not a bona fide system under *Teamsters* v. *United States* 97 S.Ct. 1843 (1977) not merely because it perpetuated Pre-Act discriminatory practices as the defendants alledge [sic], but because this system operated right up to the day of trial in a discriminatory manner. (*See, Teamsters supra* 97 S.Ct. 1860. Note 28). This seniority system had a discriminatory genesis *(See Teamsters, supra* 97 S. Ct. 1865. The background of labor relations of this Company and the seniority system clearly shows this to be true. The record in this case clearly supports this finding.

The fact that the defendants' seniority system operated in a discriminatory fashion right up to the day of trial distinguishes these cases from *Evans, supra* 97 S.Ct. 1889 (1977). At least two of the three cases cited in the motion to dismiss, *Teamsters* and *Evans*, go out of their way to point out that they are not discussing any seniority system that is not bona fide.

As far as *Hazelwood* is concerned, the Supreme Court's decision rests on the question of whether the defendant should have been allowed to put on evidence to rebut the plaintiff's prima facie case. The defendants here was [sic] allowed, and they did, put on a substantial amount of evidence in an unsuccessful attempt to rebut the prima facie case. *Hazelwood*, therefore, is inapplicable to these cases.

By the same token the Court is not willing to adopt the plaintiff's view that *Hazelwood*, as applied by the Fifth

Order of the District Court Denying Motions to Reconsider and Vacate Prior Findings of Liability

Circuit's decision in *James* v. *Stockhom Values & Fittings Company*, — F.2d—, 15 E.P.D. § 7842 (5th Cir. 1977), alters the Fourth Circuit's modification of this Court's relief provisions with respect to the preferential hiring of supervisory personnel.

Defendants have also moved for certification of this Court's decision to deny their Motions to Vacate and Dismiss. The Court denies that motion.

ENTER: 12/23/77

G.V.B.
United States District Judge

Panel Opinion of the Court of Appeals ("Patterson II")

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 78-1083, 78-1084.

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR, each individually and on behalf of all other persons similarly situated, and Equal Employment Opportunity Commission,

Appellees,

—v—

The AMERICAN TOBACCO COMPANY, a Division of American Brands, Inc.,

Appellant.

and

TOBACCO WORKERS' INTERNATIONAL UNION, an unincorporated association, et al.,

Defendants.

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH AND PERCY TAYLOR, each individually and on behalf of all other persons similarly situated, and Equal Employment Opportunity Commission,

Appellees,

—v—

TOBACCO WORKERS' INTERNATIONAL UNION, an unincorporated association, Local 182, Tobacco Workers' International Union, an unincorporated association,

Appellant.

Argued April 6, 1978. Decided Oct. 23, 1978.

Before WINTER, BUTZNER and WIDENER, Circuit Judges.

Panel Opinion of the Court of Appeals ("Patterson II")

Henry T. Wickham, Richmond, Va. (John F. Kay, Jr., Stephen A. Northup, Mays, Valentine, Davenport & Moore, Richmond, Va., Paul G. Pennoyer, Jr., Arnold Henson, Bernard W. McCarthy, Chadbourne, Parke, Whiteside & Wolff, New York City, on brief); Jay J. Levit, Richmond, Va. (James F. Carroll, New York City, on brief), for appellants.

Henry L. Marsh, III, Richmond, Va. (S. W. Tucker, Randall G. Johnson, Richmond, Va., John W. Scott, Jr., Chapel Hill, N. C., Hill, Tucker & Marsh, Richmond, Va., on brief); Ramon V. Gomez, Atty., E. E. O. C., Washington, D. C. (Abner W. Sibal, Gen. Counsel, Joseph T. Eddins, Associate Gen. Counsel, Beatrice Rosenberg, Asst. Gen. Counsel, E. E. O. C., Washington, D. C., on brief), (Jack Greenberg, Barry L. Goldstein and O. Peter Sherwood, New York City, on brief), for appellees.

WINTER, Circuit Judge:

These appeals by American Tobacco Company (American) and Tobacco Workers' International Union (Union) from the district court's denial on the merits of their motion under F.R.Civ.P. 60(b) require us to decide whether our decision in *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4 Cir.), *cert. denied*, 429 U.S. 920, 97 S.Ct. 314, 50 L.Ed.2d 286 (1976), and the order of the district court implementing our views, must be modified to conform to the later decisions of the Supreme Court in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *United Airlines, Inc.* v. *Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); and *Hazelwood School District* v. *United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). The district court thought not, but we think that *Teamsters* re-

quires further proceedings. We therefore affirm in part and vacate and remand in part.

I.

Briefly stated, the instant case is a consolidation of an action by EEOC and a class action by black employees to redress race and sex discrimination in working conditions at three facilities operated by American in Richmond, Virginia. The district court found that, before 1963, racial discrimination in hiring, promotion and working conditions was overt. The district court found no discrimination in American's hiring practices after 1965, but it did find that, while promotional policies after 1968 were "facially fair and neutral," they were discriminatory in operation because they served to perpetuate the effects of past discrimination. The district court granted sweeping relief; but, as modified by us, the relief granted was limited to (1) requiring American to post more definite written job descriptions when vacancies occurred; (2) requiring American to eliminate lines of progression in six of nine job groups; (3) requiring American to permit blacks in the prefabrication department in one branch to transfer to a job in the fabrication department at another branch without losing company seniority despite American's longstanding policy disallowing inter-branch transfers with retention of company seniority; (4) granting back pay to employees unlawfully denied promotion; and (5) requiring American to develop and apply objective criteria for appointing supervisory personnel. A fuller description of the facts, the district court's decision and our views appears from our opinion in *Patterson* v. *American Tobacco Co., supra.* As needed, we will amplify our description of them elsewhere in this opinion.

Panel Opinion of the Court of Appeals ("Patterson II")

We turn to a consideration of the effect of each of the subsequently decided Supreme Court cases.

II.

So far as pertinent here, *Teamsters* concerned an employer who was a common carrier of motor freight with nationwide operations. The employer had been found to have engaged in a pattern and practice of employment discrimination against Negroes and Spanish-surnamed Americans in hiring line drivers. The members of these minority groups had been hired only in lower paying, less desirable jobs as servicemen or local city drivers. Thereafter they were discriminated against with respect to promotions and transfers because of the seniority system established by the collective bargaining agreements between the employer and the union. That system provided that a line driver's seniority for competitive purposes, such as the order in which he may bid for particlular jobs, is laid off or is recalled from layoff, dated from the date he became a line driver and not the date that he was initially employed if he had been employed originally as a city driver or serviceman.

The Court had no difficulty in concluding that the vice of this seniority arrangement was that it "locked" minority workers into inferior jobs and perpetuated prior discrimination by discouraging transfers to jobs as line drivers, and the Court concluded that under *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the seniority system would be invalid, unless § 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) required a different conclusion.[1] From its review of the

[1] In pertinent part, § 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of

language of § 703(h) and its legislative history, the Court said that with respect to pre-Act discrimination "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." 431 U.S. at 352, 97 S.Ct. at 1863. Stressing the language of § 703(h), however, the Court also held that the statute "does not immunize *all* seniority systems. It refers only to 'bona fide' systems, and a proviso requires that any differences in treatment not be 'the result of an intention to discriminate because of race . . . or national origin. . . .'" (Emphasis added.) 431 U.S. at 353, 97 S.Ct. at 1863. The overall holding of the Court was that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." 431 U.S. at 353-54, 97 S.Ct. at 1864.

As construed by the Court in *Teamsters*, § 703(h) carves out an exception to the holding of *Griggs* that an otherwise neutral practice which perpetuates the effects of past employment discrimination is violative of Title VII. As we read *Teamsters*, this is a narrow exception, concerning only practices directly linked to "a bona fide seniority system." Section 703(h) does not insulate an entire promotional system even if such system is facially neutral. At most, it insulates only the seniority aspects of the promotional system. Consequently, *Teamsters* requires no modification of the relief we approved with regard to job descriptions, lines of progression, back pay (except such awards as may have been founded upon American's seniority system) or supervisory appointments. Only our decision to

---

employment pursuant to a bona fide seniority . . . system . . ., provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."

allow black employees to make interbranch transfers with the retention of company seniority impinges upon American's *seniority* system. It is, therefore, only this aspect of the relief granted in *Patterson* that is called into question by *Teamsters*.

In conforming our decision to *Teamsters*, we recognize the limitation of its holding that under § 703(h) only "bona fide" seniority systems insulate the present effects of pre-Act discrimination.[8] In the instant case, the district court was equally aware of this limitation. It concluded, however, that American's seniority system was not bona fide (1) "because this system operated right up to the day of trial in a discriminatory manner," and (2) because "[t]his seniority system had a discriminatory genesis . . . [t]he background of labor relations of [American] and the seniority system clearly shows this to be true . . . [t]he record in this case clearly supports this finding."

While we agree with the district court that American's seniority system would not be bona fide if it either currently served a racially discriminatory purpose or was originally instituted to serve a racially discriminatory purpose, we cannot sustain the district court's ultimate findings in this regard. The district court made no subsidiary findings,

---

[8] Because in *Teamsters* it was conceded that the seniority system "did not have its genesis in racial discrimination, and . . . was negotiated and has been maintained free from any illegal purpose," 431 U.S. at 356, 97 S.Ct. at 1865, the Court did not find it necessary to expound on the factors which make a seniority system "bona fide." In approving the concession, the Court did state that the system applied to all employees, regardless of race or national origin, that all non-line drivers were locked into their positions, and that separate employment conditions for line drivers was "rational" under industry practice and precedents of the National Labor Relations Board. But it gave us and the other lower federal courts no additional guidance. We do not attempt an overall definition of "bona fide" at this stage of this case; we await the full development of the facts.

either in its initial decision or in its ruling on the Rule 60(b) motions, to support its ultimate conclusions. It is thus impossible for us to tell upon what underlying facts the district court relied and whether proper statutory standards were observed. *See Kelley* v. *Everglades Drainage District,* 319 U.S. 415, 422, 63 S.Ct. 1141, 87 L.Ed. 1485 (1943); *Schneiderman* v. *United States,* 320 U.S. 118, 130, 63 S. Ct. 1333, 87 L.Ed. 1796 (1943); *O'Neill* v. *United States,* 411 F.2d 139, 145-46 (3 Cir. 1969); *Woods Construction Co.* v. *Pool Construction Co.,* 314 F.2d 405, 406-07 (10 Cir. 1963); *Knapp* v. *Imperial Oil & Gas Products Co.,* 130 F.2d 1, 3–4 (4 Cir. 1942).

It is not surprising that the district court's findings in its original decision did not completely assay the field since *Teamsters* had not yet been decided. While ordinarily we would not think that F.R.Civ.P. 52 requires the same degree of specificity in findings of fact when a Rule 60(b) motion is denied on the merits as it requires in a non-jury trial, the fact is that in the instant case the decision in *Teamsters* intervened between the initial decision on the merits and the denial of the Rule 60(b) motions. Since the effect of *Teamsters* raised new and difficult issues, we think that we are justified in requiring full compliance with Rule 52. That compliance necessitates remanding the issue to the district court for further findings. On remand, the district court may reopen the record and receive additional proof with regard to the bona fides of American's seniority plan since that issue emerged after the original record was made.

III.

We think that neither *United Air Lines, Inc.* v. *Evans, supra,* nor *Hazelwood School District* v. *United States,*

requires us to modify our original decision in the instant case.

Evans held that Title VII was not violated by an employer which, consistent with its bona fide seniority system, declined to grant retroactive seniority to an employee who was rehired after having been earlier discharged as a result of a discriminatory practice, when that employee at the time of her discharge had failed to file a timely charge with EEOC. American and the Union contend that *Evans* stands for the proposition that American's promotional system may not now be modified despite a finding of a *Griggs* violation, because plaintiff's failed to file a timely challenge to this system after its adoption in 1968. We do not read *Evans* so broadly. *Evans* dealt only with a one-time violation (a discriminatory discharge) which had a continuing effect only as the result of an otherwise neutral seniority system. It did not deal with a continuing violation such as a discriminatory promotional system where the discrimination continues from day to day and a specific violation occurs whenever a promotion is made. *Evans* does not purport to limit the broad remedial powers of a federal court. But for § 703(h) and its validation of the present effects of a bona fide seniority system, a court, in a proper case like the instant one, may still redress the present effects of past discrimination by requiring the modification of present practices which repeat that discrimination.

Hazelwood was a case of racial discrimination in the employment of school teachers for public schools. So far as pertinent here, it held that (1) in determining from statistical proof whether a prima facie case of discrimination had been shown, the proper consideration was between the racial composition of the school district's teaching staff and the racial composition of the qualified public school

teacher population in the relevant labor market, and (2) if that comparison showed sufficient substantial disparity to constitute a prima facie case, the employer must still be given the opportunity to show that the disparity resulted from pre-Act hiring rather than illegal post-Act discrimination. That is, *Hazelwood* admonishes courts in Title VII cases to give careful consideration to post-Act hiring data.

American and the Union contend that, when properly applied, *Hazelwood* requires the conclusion that the district court's determination that American had practiced racial and sexual discrimination in the employment of supervisory personnel cannot stand and that that finding and the relief flowing from the alleged violation must be set aside. Essentially, their argument is that liability was found solely on statistics showing the percentages of blacks and females in American's supervisory work force at various dates, but that there was no comparison with the relevant supervisory population nor were the pre-Act supervisory appointments eliminated from the relevant statistics.

To these contentions, there are various answers. As the district court recognized in denying the Rule 60(b) motions, *Hazelwood* is in part a decision as to what constitutes a prima facie case. In the instant case, American and the Union were not held to have violated the Act on the theory that a prima facie case was proved against them. They were given full opportunity to rebut the statistical proof, and they availed themselves of it. The total proof, even under *Hazelwood*, showed violations.

In our earlier opinion, we disclosed our recognition of the total proof in discussing what relief would be appropriate. We stated our recognition that Title VII was not retroactive and that the racial and sexual percentages of appointments after Title VII became effective were the

significant ones. 535 F.2d at 274. Nonetheless, we concluded that, notwithstanding that appointments since 1965 of qualified blacks and women exceeded the ratio of these groups in the workforce, American was not exonerated from a violation of Title VII because "[t]he tardy appointments of blacks and women to supervisory positions long after the passage of Title VII and the present lack of published job descriptions and objective selection procedures fully justify the injunctive relief the district court ordered." 535 F.2d at 275. *Hazelwood* clearly recognizes the sufficiency of such proof. 433 U.S. at 309–10 n. 15, 97 S.Ct. 2736.

We therefore conclude that *Hazelwood* not only requires no modification of our prior holding with respect to supervisory personnel, but indeed reinforces our views.

For these reasons, the order of the district court denying the motions of American and the Union under F.R.Civ.P. 60(b) on their merits is affirmed in part and vacated and remanded in part for further proceedings consistent with this opinion.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

WIDENER, Circuit Judge, concurring and dissenting:

I agree that the case should be remanded for reconsideration in the light of *Teamsters*, although I do not agree with the narrow construction of *Teamsters* which the majority advocates.

I respectfully dissent from the refusal of the majority to remand the case for reconsideration in the light of *Hazelwood*, and also respectfully dissent from the refusal of the majority to require a reconsideration of the case on remand in the light of *Evans*.

Panel Opinion of the Court of Appeals ("Patterson II")

I

The evidence in this case upon which the district court found liability was statistical. That court did not find "specific proof of overt or particular acts of discrimination." The whole case must be read with that background.

II

The facts in this case are found by the district court, and I accept them for the purpose of this dissent. My disagreement with the majority as it refuses to apply *Hazelwood* is not a factual dispute; rather, I dissent from its refusal to apply that case in a factual situation which demands its consideration.

III

Teamsters

While I have indicated that I concur in the remand for reconsideration in the light of *Teamsters*, I think the remand too narrow in at least one respect.

In our opinion, the bounds of our remand were based on the following statement:

> "As construed by the Court in *Teamsters*, § 703(h) carves out an exception to the holding of *Griggs* that an otherwise neutral practice which perpetuates the effects of past employment discrimination is violative of Title VII. As we read *Teamsters*, this is a narrow exception, concerning only practices directly limited to 'a bona fide seniority system'. Section 703(h) does not insulate an entire promotional system even if such system is facially neutral. At most, it insulates only the seniority aspects of the promotional system." P. 303.

Panel Opinion of the Court of Appeals ("Patterson II")

We then continue, "Consequently, *Teamsters* requires no modification of the relief we approved with regard to job descriptions, *lines of progression*, back pay (except such awards as may have been founded upon American's seniority system) or supervisory appointments." (Italics added).

It is to the part of our opinion respecting "lines of progression" that I here take exception as well as to the reasoning.

We decline to require the district court to reconsider that matter because *Teamsters* insulated only "seniority aspects" of the system, our construction of § 703(h) being a "narrow exception" to the holding of *Griggs*.

I doubt that we should say a statute enacted by Congress which has just received a literal construction by the Supreme Court in *Teamsters* can be said to be a "narrow exception." By the same token, I doubt that *Teamsters* can be said a "narrow exception" to *Griggs*, or that both *Teamsters* and § 703(h), read together, make up a "narrow exception."

It is entirely in line with our limiting of *Teamsters* and § 703(h) that we disregard footnote 41 at p. 355, 97 S.Ct. at p. 1864 of *Teamsters*. That note provides in pertinent part:

> "Then as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a *line of progression*. . . . (citations omitted). The legislative history contains no suggestion that any one system was preferred."

The opinion of the district court does not discuss in any detail the origin of the lines of progression referred to in paras. 38–47 of the stipulation of the parties. Neither does

Finding 38 of the district court, which, with three exceptions, finds them not justified by business necessity. How or if lines of progression are tied to a seniority system, especially to a collective bargaining agreement, whether bona fide or not, was simply not contemplated by the parties, by the district court, or by us in our previous opinion. Neither are any details of their operation shown. This is shown not only by the opinion and findings of the district court but by the references in our previous opinion to the lines of progression summarized accurately by this quotation: "In this respect, the lines of progression perpetuated the effects of past discrimination in a manner similar to the formerly segregated departmental seniority rosters." p. 264. It is at once apparent that the situation just described from our opinion in this case is very similar to the situation which faced the Court in *Teamsters*, as described by the Court at p. 350, 97 S.Ct. at p. 1862: "This disproportionate distribution of advantages does in a very real sense 'operate to "freeze" the status quo of prior discriminatory employment practices.' " This point should be of especial interest to the union defendants, for while we recited, at p. 270, that the "local acquiesced without protest in the lines of progression," it might be of significant difference if the lines of progression were part of a bona fide seniority system. And from all of the defendants' standpoints, it undoubtedly makes a difference as to whether there is one defense to assert, business necessity, or two, business necessity and § 703(h).

Nothing in the record shows that the lines of progression here are significantly different from those described in the Cooper and Sobol Article found in 82 Harvard L.Rev. 1598 which the Court referred to in note 41.

For these reasons, I think the question of whether the

"lines of progression" are a part of a bona fide seniority system, all aspects of which we have dismissed in our opinion with little discussion, is worthy of further examination in the light of *Teamsters*, especially n. 41 thereof. I express no opinion on the merits of the question, but I insist it should be factually developed because the law has changed since our opinion, as everyone acknowledges.

IV

Hazelwood

A. The Richmond office, with only four or five vacancies involved, as distinguished from the Richmond branch, is not a part of this appeal, and I do not consider it in this dissent.

B. I am in basic agreement with the statement in the proposed opinion, page 12, that "*Hazelwood* admonishes courts in Title VII cases to give careful consideration to post-Act hiring data," but I cannot agree with its application to affirm the district court's finding of liability as to the defendant's selection of supervisory personnel.

What the opinion overlooks is that *Hazelwood* establishes that a Title VII employer which from the applicable date "made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes." 433 U.S. at 309, 97 S.Ct. at 2742. Reviewing the findings of the district court with regard to supervisory promotion and hiring, I do not find the evidence of post-Act discrimination compelling; indeed, if we must find one way or another, the opposite seems to be true. In considering the statistics set out below, I note that the defendants claim that in the Richmond SMSA, the relevant labor market under *Hazelwood*, black people constitute

App. 64). The first female supervisor at the Virginia branch 12% of those eligible for the supervisory work force, and females 5%. Appellants' brief in Nos. 78–1083–84, at pages 9–10 and 37. These figures are the same as the defendant company's opening brief, page 14, in Nos. 75–1259 through 63. I have been unable to find in plaintiff's brief either on this or the previous appeal, or in the EEOC brief in Nos. 75–1262/1263, any dispute that 12% and 5% are the correct figures for the Richmond SMSA, so I consider them to be correct, for they favor the plaintiffs more than the SMSA figures we used in our previous opinion, p. 275, 6.8% black and 1.5% women. Employment of the percentages we used before would weight that I have to say far more toward the defendants.

At the Virginia branch, I note the district court found that since the effective date of Title VII "at least eighteen employees have been hired for or promoted to the position of assistant foreman...." (Finding (F.16), App. at page 58). The court further found that in 1963 the first black supervisor was promoted from the ranks at the Virginia branch (F.47, App. 63); that as of May 16, 1969 three supervisors were black (F.48, App. 63); that as of April 16, 1973 five supervisors were black (F.49, App. 64); and that as of January 1, 1974 six supervisors were black (F.50, was selected in 1972 (F.100, App. 75–76); and as of June 1, 1973 there were three female supervisors (F.101, App. 76).

Applying the relevant percentages of the Richmond SMSA under the *Hazelwood* analysis, we would expect that if defendants had selected the eighteen post-Act supervisors in a non-discriminatory manner, 12% of them or 2.16 would be black, and 5% or .9 would be female. The district court's findings do not, unfortunately, indicate the date,

race, and sex of each post-Act Virginia branch supervisor selection, and most importantly do not indicate the date of each vacancy, the person who filled it, and the applications for the position. But, it is almost certain that of the six black supervisors employed on January 1, 1974, five were appointed after July 1, 1965. See plaintiff's exhibit 35J. Ex.App. 127–131. If this is true, five of the eighteen supervisory post-Act selections were black, a percentage of 27.7%, more than twice the figure to be expected under *Hazelwood*. By May 16, 1969, only four months after the EEOC complaint had been filed and almost four years *before* either suit was filed, it again seems almost certain that of the three black supervisors then employed, two were hired post-Act. See plaintiff's exhibit 35J. Assuming that after that date only black people were selected as supervisors (the worst case for defendants playing catch-up), even as of May 1969, two of thirteen post-Act selections or 15.3% were black. Thus, by 1969 the defendants already had exceeded the percentage to be expected under *Hazelwood*.

Analyzing the finding of sex discrimination in the selection of Virginia branch supervisors leads to very much the same result. The first female supervisor was selected in 1972 (F.100, App. 75–76), and with that selection the company had exceeded the *Hazelwood* expected percentage, for if only one of eighteen post-Act supervisory appointments were female this would be 5.5%, exceeding the expected *Hazelwood* percentage of 5%. In fact, three of the eighteen post-Act supervisory appointments were female, a percentage of 16.67% or more than three times the *Hazelwood* expected figure.

At the Richmond branch similar results obtain as at the Virginia branch. There were nine post-Act supervisory selec-

tions at the Richmond branch (F.17, App. 59). The first black supervisor at the branch was selected from the ranks June 1, 1966 (F.51, App. 64). The second black supervisor was selected from the ranks February 1, 1971 (F.53, App. 64). As of June 1, 1973 there were three black supervisors (F.56, App. 64). Applying *Hazelwood*, we would expect to find 12% or 1.08 of the nine selectees were black. This figure was reached by the 1966 promotion (since I think we must disregard the .08 person), almost three years *before* the EEOC complaint was initiated and seven years *before* the filing of either case. In fact, from the district court's findings it appears that three of the nine post-Act selections went to black people; this 33% figure considerably exceeds the *Hazelwood* expected figure of 12%.

The first female supervisor at the Richmond branch was selected from the ranks in 1967 (F.102, App. 76). By June 1, 1973, there were two female supervisors (F.88, App. 70; F.103, App. 76). Under *Hazelwood* we would expect 5% or .45 of the nine supervisors to be female. The 1967 selection, two years *before* the EEOC proceedings, and years before suit was filed, more than doubled the expected percentage, and the additional post-Act selection of another woman by 1973 presents a figure of 22%, more than four times the expected figure of 5%.

To summarize the pertinent data:

		Hazelwood percentage	*Actual percentage*	*Date of meeting Hazelwood expectancy*
Virginia Branch:	black	12%	27.7%	May 16, 1969
	female	5%	16.67%	1972
Richmond Branch:	black	12%	33%	June 1, 1966
	female	5%	22%	1967

Panel Opinion of the Court of Appeals ("Patterson II")

Defendants have made similar points in their brief, see opening brief in Nos. 78–1083/84 at 9–10, 37–38, but we did not consider them in our opinion.

These post-Act data indicate that in every circumstance at the Richmond and Virginia branches the actual selection of supervisors surpassed the numbers we might expect when applying, as we must, the methodology of *Hazelwood*. We may not, I think, on these data, consistent with *Hazelwood*, affirm the district court's finding of discrimination in supervisory selections. If the selection of supervisory personnel outlined above does not statistically satisfy the Supreme Court's requirement that post-Act employment decisions be made on a nondiscriminatory basis, the company and union justifiably may ask what post-Act actions could have statistically complied with our interpretation of Title VII.

As the data disclose, post-Act supervisory selections have favored, rather than burdened, women and black people. Accordingly, on the record we should vacate the injunction ordering the company to develop objective criteria for the selection of supervisors. The statistics verify that no adverse impact has been visited upon the plaintiff classes as a result of the subjective criteria, and thus there is no need for equitable relief. If we affirm the injunction, we will be ruling in effect that subjective selection criteria are a *per se* violation of Title VII, that is, a violation regardless of whether the practice has adversely affected a protected class. That the practice has not been proved to have affected any individual must be conceded absent further factual development. In fact, on the record as it now stands, not only is injunctive relief uncalled for, but in the absence of any evidence except the statistics and evidence now before us, I think we should properly direct the entry of judgment for the defendants on the entire issue of supervisory selection at the Richmond and Virginia branches. When I say absence

of other evidence except statistics and that presently in the record, I keep in mind the absence of objective criteria and tardy appointments. I think I have demonstrated above that so far as this record shows the appointments were not tardy at the Richmond and Virginia branches unless pre-Act appointments are included which *Hazelwood* forbids. The plaintiffs, having not proved by post-Act statistics any adverse effect on the plaintiff classes, and the appointments not being tardy, the mere fact that there is no objective criteria for promotions in this case is irrelevant. I grant that in a proper case it may be relevant, and having objective criteria might seem to be prudent to avoid suspicion, but I doubt that our authority extends so far when no post-Act violation has been shown. Indeed, we have recently been reminded of that fact in *Furnco Construction Corp.* v. *Waters*, —— U.S. ——, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978), when the Court said: "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." P. ——, 98 S.Ct. p. 2950.

My construction of *Hazelwood* is fortified by the following quotation from *Teamsters*, p. 350, 97 S.Ct. p. 1862, upon which the Court depended and which comes from the Congressional Record:

> " 'Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, *if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis.* He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes or to prefer Negroes for future vacancies, or, once Negroes are hired to give them

> special seniority rights at the expense of the white workers hired earlier.' 110 Cong.Rec. 7213 (1964) (emphasis added)." (Italics are the Supreme Court's.)

In view of the facts found by the district court I have recited, I think it is apparent that we did not apply the principles of *Hazelwood*. Our opinion, I think, misconceives its holding. That case requires, at the very least, in a matter such as we have before us, which depends on statistical evidence for a finding of liability, an analysis of the employer's and the unions' actions since the enactment of Title VII. A reading of the findings and opinion of the district court discloses that it did not make such an analysis, and a reading of our opinion discloses that we did not. While we did indicate, at p. 264 of our earlier opinion, that "after the effective date of Title VII" the company and union discriminated, a review of our analysis of the supervisory appointments which is part III of that opinion, beginning at p. 277, at once should show us our error. There, we considered the dates of some, but not all, post-Act appointments and found them "tardy" notwithstanding that they exceeded statistical sufficiency when measured as a group. *What we did not consider, as did not the district court, were the dates of each of the appointments as well as the dates of each of the various vacancies which brought about the appointments.* That is what *Hazelwood* commands, and that is where, lacking *Hazelwood's* guidance, we erred. Our error is pointed up in *Furnco*, —— U.S. at p. ——, 98 S.Ct. at p. 2951, where the Court states: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." (Italics are the Court's). Neither we nor the district court con-

sidered *each* vacancy, the date thereof, and how it was filled, as the beginning point of a statistical analysis. Absent such, any conclusion based on statistical inferences may not stand in the light of *Hazelwood*.

The statistical facts I have used are undisputed and found by the district court. Yet there are certain omissions in them because a *Hazelwood* analysis was not engaged in. I am also aware that an employer cannot, by playing catch up, "erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it." *Teamsters* p. 342, 97 S.Ct. p. 1857. Yet those affected must be "victims of the earlier post-Act discrimination." *Teamsters* p. 342, 97 S.Ct. p. 1857. For these reasons, in order to be entirely fair, I would not enter judgment for the defendants, but would remand the case to have the district court inquire into each promotion to supervisory status made since the enactment of the statute, as well as far enough prior to its enactment to insure continuity. There have been so few post-Act appointments, less than 30, that such an inquiry is a small task. Only by a post-Act analysis of the employer's and unions' employment decisions may *Hazelwood* be complied with. I think this analysis has not yet been made either by us or by the district court and I would require it now.

V

Evans

If I agreed with the majority as to the construction the defendants wish us to place upon *Evans* and how they wish us to require the district court to apply that case on remand, I might concur in its opinion in that respect. However, I do not read the contentions of the defendants as does the majority, so I think its direction not to apply *Evans* is premature.

Panel Opinion of the Court of Appeals ("Patterson II")

As I read the papers, the defendants seek to apply *Evans* to insulate themselves from liability premised on the pre-1968 practices of job experience seniority of "qualifications," and "canvassing." Opening brief at 19, reply brief at 6. They argue that, since no EEOC charge was filed within 90 days of the 1968 agreement, acts under it are now barred from suit because of § 706(d), 42 U.S.C. § 2000e–5 (d) (since amended). In fact, they seem to argue that because of *Evans* these practices are not relevant to the determination of Title VII liability. See reply brief at 4.

The second point may be disposed of by reference to the paragraph in *Evans* quoted in the margin.[1] Although when the period has run the employer may not be held liable for the discriminatory act, that act still "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." 431 U.S. at 558, 97 S.Ct. at 1889. Thus, it appears the pre-1968 practices of "qualifications" and "canvassing" were admissible evidence, and should not be excluded merely because the limitations period has run.

The first argument of defendants, that they may not be held liable for the "qualifications" and "canvassing" procedures because more than 90 days had run between the cessation of those practices and the institution of the *Patterson* suit, I think, premature at this point. *Evans* applies a statute of limitations, and it is generally accepted that the period will not begin until a cause of action accrues. 54 C.J.S. *Limitations of Actions* § 108. Just because more than ninety

[1] "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences." 431 U.S. at 558, 97 S.Ct. at 1889.

days passed between the cessation of the illegal practices and the filing of the suit is not dispositive; it seems that the causes of action of individual class members affected by those practices will not necessarily have accrued by the time the practices stopped if they had suffered no damage by that time. Accordingly, I think the applicability of *Evans* to the limitations period should be left to the district court on remand, for only then can it be known when the individual causes of action arose.

Deciding now that *Evans* has no application I think premature, just as would be deciding now it had across-the-board application.

En Banc Opinion of the Court of Appeals ("Patterson III")

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1083

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated and Equal Employment Opportunity Commission.

Appellees.

—v—

THE AMERICAN TOBACCO COMPANY, a Division of American Brands, Incorporated,

Appellant,

and

TOBACCO WORKERS' INTERNATIONAL UNION an unincorporated Association; et al.,

Defendant.

No. 78-1084

JOHN PATTERSON, MARION MOSHOE, EDMUND PAGE, JAMES RANDOLPH and PERCY TAYLOR, each individually and on behalf of all other persons similarly situated and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellees,

—v—

En Banc Opinion of the Court of Appeals ("Patterson III")

TOBACCO WORKERS' INTERNATIONAL UNION, an incorporated association; LOCAL 182, TOBACCO WORKERS' INTERNATIONAL UNION, an unincorporated association,
Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Albert V. Bryan, Jr., District Judge.

Argued June 5, 1979. Decided November 18, 1980

Before HAYNSWORTH, Chief Judge, WINTER, BUTZNER, RUSSELL, WIDENER, HALL and PHILLIPS, Circuit Judges, sitting en banc.

Henry T. Wickham (John F. Kay, Jr., Stephen A. Northup, Mays, Valentine, Davenport & Moore, Paul G. Pennoyer, Jr., Arnold Henson, Bernard W. McCarthy, Chadbourne, Parke, Whiteside & Wolff on brief) for The American Tobacco Company, A Division of American Brands, Inc.; Jay J. Levit (James F. Carroll on brief) for Tobacco Workers' International Union and Local 182, Tobacco Workers' International Union; Henry L. Marsh, III (S. W. Tucker, Randall G. Johnson, John W. Scott, Jr., Hill, Tucker & Marsh; Jack Greenberg, Barry L. Goldstein, O. Peter Sherwood on brief) for John Patterson, et al.; Ramon V. Gomez, Equal Employment Opportunity Commission (Abner W. Sibal, General Counsel, Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg, Assistant General Counsel on brief) for Equal Employment Opportunity Commission.

En Banc Opinion of the Court of Appeals ("Patterson III")

PHILLIPS, Circuit Judge:

In these consolidated Title VII actions brought by EEOC and a class of black employees against American Tobacco Company (American) and Tobacco Workers' International Union (Union) alleging race and sex discrimination in hiring, promotion, transfer and other employment practices, the district court found violations and granted sweeping relief which, with modifications, was then approved by this court upon appeal. *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976). Following entry by the district court of a modified judgment in conformity with our mandate upon remand, the Supreme Court decided *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977); and *Hazelwood School District v. United States*, 433 U.S. 299 (1977). Asserting that these decisions constituted significant intervening changes in the law entitling them to equitable relief from the judgment, American and the Union moved under Fed. R. Civ. P. 60(b) for appropriate relief.[1] The district court denied the motion and this appeal by the defendant-movants followed. It was first heard by a panel of this court which decided that while *Evans* and *Hazelwood* did not entitle the movants to any relief from the judgment, *Team-*

[1] Defendants first moved for relief in this court, seeking a recall of mandate and an order directing the district court to vacate its modified judgment. The recall of mandate was denied on the authority of *Standard Oil Co. v. United States*, 429 U.S. 17 (1976), as not requisite to district court consideration of the motions for relief. Jt. Supp. App. 2, 3. Defendants then moved in the district court that the modified judgment be vacated and the complaints dismissed on the basis of the intervening decisions. While the motions did not identify the rule under which they were made, they are most appropriately treated as motions under Fed. R. Civ. P. 60(b)(5) for relief from a judgment certified as final for purposes of appeal under Fed. R. Civ. P. 54(b). Jt. App. 183-84.

sters might, and that remand for further proceedings in light of *Teamsters* was required. *Patterson v. American Tobacco Company*, 586 F.2d 300 (4th Cir. 1978).

Upon rehearing by the court *en banc*, we conclude that the decision in *Evans* did not entitle the defendants to any relief from the judgment but that the decisions in both *Teamsters* and *Hazelwood* may require relief whose specific form can only be determined by further proceedings in the district court. Accordingly we affirm in part and vacate and remand in part for further proceedings.

I

The factual background and protracted procedural history of these cases is adequately set out in our earlier opinion, 535 F.2d 257, and in the panel opinion withdrawn upon our *en banc* rehearing of the instant appeals, 586 F.2d 300. It need not be repeated in full here; specific details necessary to our discussion will suffice.

By way of general background, the essential features of the modified judgment from which relief by motion is now sought are here summarized. Based upon findings of violations by the defendants in transfer and promotion practices affecting non-supervisory employees and in the procedures by which supervisory employees were appointed, the judgment required American to: (1) post more definite written job descriptions when vacancies occurred; (2) eliminate lines of employment progression in six of nine job categories; (3) permit blacks in the prefabrication department in one branch to transfer to jobs in the fabrication department at another branch without losing seniority despite American's long-standing policy disallowing inter branch transfers with retention of company seniority; (4) make back-pay awards to employees unlawfully denied promo-

tions; and (5) develop and apply objective criteria for appointing supervisory personnel. Reserved for judgment and still pending for determination in the district court were the individual claims for restitutionary back pay awards.

The defendants contend that the cited Supreme Court decisions require relief in various ways from the further enforcement of the judgment. We consider the effect of each decision in order.

II
Teamsters

Defendants contend that *Teamsters* draws in question the continued validity of those portions of the challenged judgment finding American's branch seniority system and its job lines of progression policy violative of § 703(a) of Title VII and granting related relief. The branch seniority system[9] was found violative on the basis that by imposing, without justification of business necessity, loss of seniority upon employees transferring from the lower paying prefabrication department of one branch to the higher paying fabrication department of another branch, blacks and women had been effectively locked into the lower paying positions. 535 F.2d at 263-64, 271. The lines of progression policy was found violative of Title VII in respect of six of nine protected job lines because of its demonstrated disparate impact upon protected employees and the failure to show its justification by any business necessity. *Id.* at 264-65, 271.

The contention is that *Teamsters* has now revealed that both the branch seniority system and the job lines of progression policy are immunized against challenge by § 703(h) of Title VII because they are, within contempla-

[9] Frequently alluded to by the litigants as the "plantwide seniority system," essentially to distinguish it from the earlier departmental system that it supplanted in 1963.

tion of that section, "bona fide" seniority systems. We conclude, that under *Teamsters* the branch seniority system must be held immune if bona fide within the meaning of § 703(h), and that this presents a factual issue requiring reconsideration by the district court. We further conclude that § 703(h) as interpreted in *Teamsters* has no application to the job lines of progression policy, so that no reconsideration of the finding of violation or of the relief granted in relation to this policy is required by *Teamsters*. Our reasons follow.

In pertinent part, § 703(h) provides that

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . ., provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(h).

When the original judgment was entered, affirmed on appeal and modified on remand, the view in this and other Circuits was, as expressed in *United States v. Chesapeake & Ohio Railway*, 471 F.2d 582, 587 (1972), that, notwithstanding § 703(h), "seniority systems which perpetuate past racial discrimination violate [Title VII]."

Teamsters expressly rejected that view, finding it belied by the legislative history of § 703(h) and holding instead that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination," 431 U.S. at 353-54. In holding the *Teamsters* seniority system immune under § 703(h), the Court emphasized that by literal terms of the statute a system's immunity depends upon its being "bona

fide," and specifically pointed to the statutory requirement that differences in treatment flowing from the system's application not be "the result of an intention to discriminate because of race." *Id.* at 353.

Because the bona fides of the *Teamsters* system was conceded, the *Teamsters* Court was not, however, required to give detailed attention to the criteria by which bona fides in a contested situation is now to be determined. The Court did point out that the system before it "did not *have its genesis* in racial discrimination, and . . . was negotiated and [had] been maintained *free of any illegal purpose.*" *Id.* at 356 [emphasis supplied]. Also emphasized were the facts that the system was facially neutral, applying alike to all employees, equally discouraging all from making intra-company transfers involving loss of seniority; and finally that the differences in employment conditions imposed by the system had a rational basis in the practices of the affected industry and were consistent with National Labor Board precedents. *Id.* at 355-56.

From this it is clear that the modified judgment in this case was entered under a misapprehension on the part of both the district court and this court as to the proper application of § 703(h) to claims of Title VII violation through the operation of seniority systems. At odds with our then understanding[,] lack of bona fides may not be rested solely upon a finding of perpetuation of pre-Act discrimination. *See Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978). Defendants are accordingly entitled to relief from that judgment to the extent the present or a reopened record shows that the "seniority system" therein found violative of Title VII is immune to challenge because "bona fide" within contemplation of § 703(h).

By their motions in the district court, the defendants con-

tended that both the branch seniority system and the lines of progression policy were now revealed to be immune under § 703(h) because their bona fides was manifest on the record. The district court, without differentiating between the two and apparently treating them as constituting together "the seniority system" in issue, held flatly that

> the seniority system of the defendants in this case is not a bona fide system under [*Teamsters*] not merely because it perpetuated Pre-Act discriminatory practices . . . but because this system operated right up to the day of trial in a discriminatory manner. [*Teamsters* citation omitted]. This system had a discriminatory genesis. [*Teamsters* citation omitted] The background of labor relations of this Company and the seniority system clearly shows this to be true. The record in this case clearly supports this finding.

Defendants, of course, challenge that conclusion. Because we consider that application of § 703(h) to the branch seniority system and to the lines of job progression policy respectively presents separate questions dictating different results, we take them up separately.

A.

We first conclude that § 703(h) simply has no application to American's job lines of progression policy, whether or not it be considered a "seniority system" in the mode of its operation.[3] This policy was not in effect at American in

[3] Plaintiffs have contended that 703(h) has no application to the job lines of progression policy because, as administered, the policy was not a seniority system within contemplation of § 703(h). Without challenging the proposition that the job lines of progression *may* constitute a 703(h) seniority system, *see Teamsters*, at 355 & n.41, the contention is that the only seniority system in effect at American was the plantwide (branch seniority) system; that it alone determined progression even within the job lines of progression

1965 when Title VII went into effect, but was only adopted in January 1968 in connection with American's general revision of its promotional policies. 535 F.2d at 263.[4]

We think that the legislative history of § 703(h), as exhaustively analyzed by the Supreme Court in *Teamsters* and

---

adopted in 1968, there being no superimposed seniority system integral to this separate policy. Plaintiffs seek and find considerable support for this position in various formal representations made by American in this litigation that the job lines of progression policy was operated entirely on a plantwide seniority basis. This was not, however, a factual issue directly litigated in the case and the record as presently composed is ambiguous on it. In view of our stated basis for deciding that 703(h) has no application to seniority systems instituted after the effective date of Title VII, we need not address this as a possible alternative basis for decision.

[4] Judge Widener's dissenting opinion challenges this factual assertion, contending that this policy was demonstrably in effect prior to the effective date of Title VII in 1965. With all respect for his exhaustive search of the evidentiary record and for the fruits of that search in which he finds support for his challenge, we simply disagree with the inferences he draws and perhaps with the legal implication he derives from those inferences.

Without attempting here an exhaustive counteranalysis of the factual record, our perception is that while the informal rudiments of what is now described as a "job lines of progression policy" certainly existed before 1965, the stated procedures adopted by American in 1968 to control entry into and promotions within specifically identified job "lines" involved enough of change and formalization (whether in favor of or against employee interests) to constitute a *new* policy, or at least one so radically altered from prior unstructured procedures that it could not be considered simply a "routine application," *see Teamsters*, 431 U.S. at 352, of those pre1965 procedures. As indicated in text of this opinion, we construe § 703(h) as a quite narrow exception to Title VII's general coverage of all "conditions of employment," including of course promotional policies, the prime subject of all types of seniority systems. In line with that narrow interpretation, we consider that "routine application" should be given a stringent reading against any employer seeking the special insulation provided by § 703(h) for any seniority "system" alleged to have been in place when Title VII was enacted. On that basis, we conclude, as a panel of this court has long since assumed—without intervening challenge of fact or law—that within contemplation of § 703(h), the job lines of progression policy here in question only came into existence in 1968.

in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), conclusively demonstrates that Congress intended the immunity accorded seniority systems by § 703(h) to run only to those systems in existence at the time of Title VII's effective date, and of course to routine post-Act applications of such systems. *See Teamsters*, 431 U.S. at 352. That history is replete with indications that the interests sought to be protected by this special exception to Title VII's general coverage of all "conditions of employment" were those seniority rights already vested in incumbent workers when Title VII went into effect.[8]

[8] The applicability of § 703(h) to seniority systems initiated after the effective date of Title VII was not decided by *Teamsters*. *See* Note, 52 Tul. L. Rev. 397, 405 (1978). The EEOC position is that § 703(h) has no applicability to seniority systems not in operation at the effective date of Title VII. EEOC Notice N-915 (July 14, 1977), *reprinted in* EEOC Compliance Manual ¶ 6500. We need not here embrace in its entirety this EEOC interpretation of *Teamsters* to agree that the legislative history suggests that post-Act seniority systems were not intended to be included in the protection of § 703(h). A memorandum prepared by Senators Clark and Case stated in explanation of the intended effect of this section that "Title VII has no effect on established seniority rights." 110 Cong. Rec. 7213 (1964). The Justice Department noted that "Title VII would have no effect on seniority rights existing at the time it takes effect." *Id.* at 7207. In discussing this legislative history, the Supreme Court noted in *Teamsters* that Title VII would allow "full exercise of seniority accumulated before the effective date of the Act," 431 U.S. at 352, and that Congress did not intend to punish employees by destroying their "vested seniority rights . . . simply because their employer had engaged in discrimination prior to the passage of the Act," *id.* at 353. The question of the application of § 703(h) to seniority systems initiated after 1965 was not present in *Teamsters* and apparently has not been authoritatively addressed subsequently. Considering that Title VII is a broad remedial statute, we believe the legislative history supports the view that only those bona fide seniority systems in operation when Title VII took effect are entitled to the protection of § 703(h). Systems initiated in the post-Act period must of course pass muster under the *Griggs* analysis in the same manner as other facially neutral policies or practices challenged as discriminatory in their consequences. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Because § 703(h) has no application to this policy, its discriminatory effect was properly assessed by the district court under the general disparate impact test laid down in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The violation then found under that test and the related relief given having been affirmed by this court, 535 F.2d at 264-66, defendants are entitled to no relief from those portions of the judgment related to American's job lines of progression policy.

B.

There is no question that if American's branch seniority system is bona fide within contemplation of § 703(h) as interpreted in *Teamsters*, defendants are entitled to relief from those portions of the judgment related to inter-branch transfers. This system, unlike the lines of progression policy, was in effect when Title VII went into effect, and seniority rights were then vested under it. Opening up inter-branch transfers to protected groups of employees without loss of their branch seniority indubitably impinges retroactively upon seniority rights already vested at the critical time in employees in the transferee branch. It is this that is forbidden by § 703(h), so long as the seniority system is "bona fide." 431 U.S. at 348-55.

We turn now to the fact that the district court in ruling on the 60(b) motion expressly concluded that in light of *Teamsters*, American's seniority system was not bona fide. Implicit in that conclusion, earlier quoted, was the district court's understanding that, under *Teamsters*, American's branch seniority system would not be bona fide if it either "had its genesis" or was thereafter "maintained" for an illegally discriminatory purpose. We agree that this is *Teamsters* teaching. *Id.* at 356. However, we do not think that the record before the district court when it ruled upon

the motion justified its specific conclusion that the system was not bona fide under this test. Certainly there are not in the record before us express findings of fact that would support such a conclusion. Whether there is evidence sufficient to support the requisite findings of fact is doubtful in view of the understanding of § 703(h)'s application that reigned in this Circuit when the original record was being made. In consequence, the present record does not permit us to conduct a principled review of the district court's ruling on this point. *See Schneiderman v. United States*, 320 U.S. 118, 129-30 (1943); *Kelley v. Everglades Drainage District*, 319 U.S. 415, 421-22 (1943); *Knapp v. Imperial Oil & Gas Products Co.*, 130 F.2d 1, 3-4 (4th Cir. 1942).

Because the issue of the branch seniority system's bona fides only emerged in its present contours after the original record was made, we conclude that the relief invoked by defendants under 60(b) can only be achieved by reopening the record for additional proof and a new determination of bona fides in light of *Teamsters*.*

III
Evans

Evans held that Title VII was not violated by an employer's failure to grant retroactive seniority under its bona fide seniority system to a rehired employee who had not filed timely charges with EEOC following her earlier discriminatory discharge. Defendants here contend that *Evans* draws in question the continued validity of the district court's judgment to the extent it finds violations of Title VII and grants relief related to defendants implementation of its 1968 promotional system, because no timely challenge to that system was filed with EEOC when the system was

* For guidance in addressing the issue the district court may find helpful the Fifth Circuit's decision in *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 350-53 (5th Cir. 1977).

adopted. We conclude that *Evans* is inapposite to the facts of this case and hence requires no modification or reconsideration of the judgment.

In *Evans* the Court specifically rejected the employee's claim that the failure to accord her retroactive seniority benefits constituted a "continuing violation" that was not time-barred. Rejection was on the basis that the seniority system itself was not charged or proven to constitute an *existing* violation of the claimants' rights to nondiscriminatory conditions of employment. In the instant case, by contrast, the violations charged and found by the district court were "continuing" in the very sense not present in *Evans*. Here the promotional policies adopted in 1968 were alleged by the claimants, found by the district court, and affirmed by this court to involve a continuing pattern or practice of discrimination that locked black and women employees into less favorable job positions. These effects, unlike the denial to the *Evans* claimant of retroactive seniority benefits, constitute truly "continuing" violations of Title VII. Hence, claims related to these violations are not barred by failure to have challenged at its inception the policy which gave continuing rise to them.

IV
Hazelwood

Defendants contend that *Hazelwood* undercuts the basis upon which discrimination was found in appointments to supervisory positions at the Richmond and Virginia branches, and that they are accordingly entitled to relief from related portions of the judgment. While we do not believe that *Hazelwood* requires full relief from the judgment on the present record, we conclude that it does require remand for reconsideration.

Hazelwood made two critical clarifications in Title VII

doctrine that might significantly have affected the district court's original assessment of the evidence, its resulting judgment, and this court's initial review of that judgment. The first has to do with the relevant time period within which discrimination is to be assessed; the second, with the assessment of statistical proof in respect of jobs claimed by the employer to require special qualifications or skills. For reasons that follow, we conclude that the judgment under attack is not supportable on the present record under a fair application of these principles from *Hazelwood,* and that their proper application can only be insured by reconsideration of the evidence related to the supervisory positions on a reopened record in the district court.[7]

The district court's original finding of discrimination in appointments to the supervisory positions was based entirely upon plaintiff's statistical proof. This showed substantial current disparities between the percentages of blacks and women in the general population of the Richmond SMSA[8] and those employed in supervisory positions by American in its Richmond and Virginia branches[9] and, again, between the percentages of black and women employees in lower level positions at American and those employed in supervisory positions by American in its two branches. Taking into account that the supervisory positions had been filled partially by hiring from outside and partially by promotion and transfers from within American's work force, the district court concluded that a violation of Title VII in filling these positions had been established by plaintiff's statistical

[7] See note 1 *supra.*

[8] There is no dispute that the appropriate geographical area from which to draw base statistical data is that defined by the Richmond SMSA.

[9] This excludes any consideration of the special case of the Richmond office which, with only four or five post-Act vacancies involved, is not in issue on this appeal.

proof. The district court considered but was unpersuaded by defendants' statistical evidence offered to rebut plaintiff's prima facie case. That evidence consisted of two elements favoring defendants' position that were then and now contended to be more probative on the issue than plaintiff's statistical evidence: statistical data showing the percentages of women and blacks categorized as "supervisors" in the SMSA figures compared with the percentages of blacks and women employed in supervisory positions at American; and statistical data showing the overall course of American's appointments to vacant supervisory positions since the effective date of the Act.

While the record is not wholly clear on the point, we are persuaded that the district court gave little, if any, consideration to these elements of defendants' proof, presumably for the very reason that *Hazelwood* had not then made plain their great importance in assessing proof of discrimination in this type case. Our reasons for this conclusion require brief analysis of *Hazelwood*'s specific teaching on the relevant issues and of the district court's order denying the Rule 60(b) motion.

As we recently pointed out in *EEOC v. Radiator Specialty Co.*, ____ F.2d ____ (4th Cir. Nov. 15, 1979) (slip op. at 17), *Hazelwood* and its recent progeny have now confirmed the inappropriateness in the usual case of using general population and general work force statistics as base data for establishing discrimination in respect of hiring and promoting to job positions requiring special qualifications "not commonly possessed or readily acquired." In the instant case, it seems obvious that in the pre-*Hazelwood* setting both the district court in entering original judgment and this court in review simply assumed the appropriateness of using plaintiffs' general population and general work force statistics as the base data for comparison with American's employment

of blacks and women in supervisory positions. On the district court's part this may have been because it rejected American's contention that special qualifications existed. If so, the record does not indicate that this was the basis for the court's reliance upon plaintiffs' statistics, nor would such a conclusion have been supported on that record. The question whether special qualifications in the *Hazelwood* sense did or did not exist for these positions could not be resolved as a matter of law on the basis of the opposing parties' bald conflicting assertions, nor by looking simply to the manifest nature of the positions, but required a factual inquiry whose necessity was not then realized. *See EEOC v. Radiator Specialty Co.*, ____ F.2d at ____ (slip op. at 14-16). That factual inquiry is required now to assure compliance with *Hazelwood*'s teaching on the appropriate use of statistical evidence to establish and to rebut a prima facie case of discrimination.

It is equally obvious that the district court and this court in the pre-*Hazelwood* setting failed to assess the evidence with appropriate regard for the relevant time period for inquiry as that too has now been clarified in *Hazelwood*. Basically, *Hazelwood* teaches on this point that the relevant period commences no earlier than the effective date of the Act.[10] This has two critical consequences. It makes irrelevant to the establishment of a prima facie case any evidence, including statistical data, related to pre-Act employment acts.[11] Perhaps more critically, it permits an employer effectively to rebut a prima facie statistical showing of discrimination in a current, static employment situation by showing

[10] Under *Evans*, of course, the beginning of the relevant time period may be at later times set by limitation periods for charging violations.

[11] Except for the limited purpose of proving inferentially the continuation of pre-Act discrimination into the post-Act time period. *See Hazelwood*, 433 U.S. at 309 n.15.

that within the critical post-Act time frame its employment acts have been non-discriminatory. Thus, an "employer who from [the effective date of the Act] forward made all its employment decisions in a wholly non-discriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes." 433 U.S. at 309.

In considering on the 60(b) motion whether *Hazelwood* required relief from the judgment, the district court took the view that its only possible relevance was "on the question of whether the defendant should have been allowed to put on evidence to rebut the plaintiffs' prima facie case." As to this, the court pointed out, the defendants had been "allowed and they did, put on a substantial amount of evidence in an unsuccessful attempt to rebut the prima facie case." Therefore, the court concluded, "*Hazelwood* . . . is inapplicable to these cases." Jt. Supp. App. at 23. As our discussion has indicated, *Hazelwood* goes well beyond simply authorizing the presentation of rebutting proof by an employer, and touches in critical ways upon the appropriate mode of assessing the total proof adduced by both sides. Our review of the record, including of course the district court's expressed perception of *Hazelwood*'s impact, persuades us that reconsideration of the evidence on a reopened record is required in order fairly to determine whether the judgment can stand in light of *Hazelwood*.[12]

As earlier indicated, it is clear in the first place that the

[12] The possibly decisive force of defendants' proof of post-Act appointments if properly considered under *Hazelwood*'s teaching is exhaustively explored in Judge Widener's opinion dissenting from the withdrawn panel opinion in this appeal. 586 F.2d at 306-10. Without attempting prejudgment of the matter, we draw attention here to that analysis merely to emphasize our conviction that *Hazelwood*'s impact may not have been fully appreciated by the district court in ruling on the Rule 60(b) motion.

question of special qualifications for the supervisory positions must be determined as a prelude to proper assessment of the statistical evidence. If it is determined that no special qualifications beyond those commonly possessed or readily acquired are involved, then general population and work force statistics within the relevant time period may appropriately be used to determine whether plaintiffs' evidence of record establishes a prima facie case.[13] If it is determined that special qualifications in this sense do exist, then the most probative evidence will be qualified market data,[14] and

[13] This will require a rough break-out of appointments by hiring from those by promotions (or transfers) from within American's work force. The relevant labor pool for assessing discrimination in promotion practices consists of qualified lower level employees. *E.g., Hill v. Western Electric Co.*, 596 F.2d 99 (4th Cir. 1979).

[14] While we have earlier noted the possibly decisive force of SMSA statistics as the appropriate qualified market data, see note 12 *supra*, the question of their actual appropriateness will itself require analysis by the district court. Defendants contend that we have already decided their appropriateness by stating in our original panel decision that they provided a "more realistic measure of the company's conduct than the gross percentage of blacks and women in the whole work force." 535 F.2d at 275. This was said, however, in the context of an evaluation of the propriety of the district court's remedial order. The question of their appropriateness for determining liability in the first instance is an open one on the present record. The SMSA statistics give the percentages of blacks and women in the Richmond area who are employed in jobs denominated as "supervisory" in the total labor pool there analyzed. Whether these percentages substantially reflect the percentages of persons in that pool "specially qualified" for American's particular supervisory positions is not manifest on the present record.

Until the actual nature of any special qualifications required for American's positions is determined in some factual detail, the probative force of the SMSA data will not be apparent. In any event, plaintiff is not absolutely required to produce evidence of the actual percentages of specially qualified blacks and women in the relevant labor pool in order to make out a prima facie case. Other data, *e.g.*, applicant-flow statistics, may be "very relevant," *Hazelwood*, 433 U.S. at 308 n.13, though this has to be carefully assessed in light of the particular situation in issue. *See Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977).

general population and work force data may be found not appropriate as the basis for statistical comparison.[18] In the latter event, plaintiffs should be allowed on the reopened record to adduce any evidence of qualified market data available to them. *See EEOC v. Radiator Specialty Co.*, ____ F.2d at ____, ____ (slip op. at 15-18).

Next, in assessing defendants' rebutting evidence, whether on the present or a reopened record, proper weight must be accorded its tendency to show nondiscrimination in post-Act employment decisions, notwithstanding the inference of discrimination permissible under *Griggs* from plaintiffs' statistical proof of a prima facie case. In order fairly to assess defendant's effort at rebuttal, it would seem necessary to establish on a reopened record the details of the relatively small number of post-Act appointments (apparently around 30 in number) to supervisory positions: the approximate dates when vacancies were filled, the race and sex of each appointee, and whether appointment was by promotion from within or hiring from without. Only so can a valid statistical comparison within the relevant labor pool be made.

---

[18] *Hazelwood* did not entirely rule out the use of general population and general work force statistics in "special qualification" cases, simply pointing out that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population . . . *may* have little probative value." 433 U.S. at 308 n.13 [emphasis supplied]. The question remains whether under the circumstances of a particular case the statistical proof offered justifies the inference on which the prima facie case rests. Our own post-*Hazelwood* cases have made it plain, however, that where special qualifications are found to exist, general population and work force statistics will not normally suffice as the base data for establishing a prima facie case. *See EEOC v. Radiator Specialty Co.*, ____ F.2d ____ (4th Cir. Nov. 15, 1979); *Hill v. Western Electric Co.*, 596 F.2d 99 (4th Cir. 1979); *EEOC v. Chesapeake & Ohio Railway*, 577 F.2d 229 (4th Cir. 1978).

V

For these reasons, the order of the district court denying on their merits the motions of American and the Union for relief under Fed. R. Civ. P. 60(b) is affirmed in part and vacated and remanded in part for further proceedings consistent with this opinion.

Affirmed in part;
Vacated and Remanded
in part.

En Banc Opinion of the Court of Appeals ("Patterson III")

WINTER, Circuit Judge, concurring and dissenting:

I concur in the majority opinion of the in banc court with respect to its treatment of the *Teamsters* and *Evans* issues both for the reasons set forth therein and the reasons expressed in the majority panel opinion, Patterson v. American Tobacco Company, 586 F.2d 300 (4 Cir. 1978) (Patterson II). I dissent from the majority's application of the *Hazelwood* principles to the instant case and from the remand for further proceedings under *Hazelwood* both for the reasons expressed in the majority panel opinion and those that follow. In my view the present record conclusively shows that the requirements of *Hazelwood* have been amply met. American has had at least one opportunity to demonstrate otherwise. It did not avail itself of that opportunity and the court should proceed to final disposition without further delay.

I

I agree that under *Hazelwood* an employer may successfully rebut a plaintiff's prima facie case, which plaintiff established by proving that the percentages of women and blacks employed as supervisors is disproportionately low to the percentages of women and blacks in the available labor pool, by showing that the percentages of women and blacks categorized as "supervisors" in the SMSA figures compared favorably with the percentages of blacks and women employed in supervisory positions by the employer. But, as I understand the law, resort to the "supervisors" statistics in the SMSA figures is predicated upon a showing by the employer that the supervisory positions require special qualifications *"not commonly possessed or readily acquired"* by the general labor force. EEOC v. Radiator Specialty Co. ____ F.2d ____, ____ (4 Cir. 1979) (emphasis added). If such a showing is not made, the appropriate statistics to be con-

sidered are those of the available labor force. I also agree that *Hazelwood* teaches that the relevant period for determining discrimination in hiring or promotion is not earlier than the effective date of the Title VII (July 2, 1964). [*sic*]

On the question of the statistics to which the court should turn to decide if plaintiffs' prima facie case was rebutted, I think that the stipulation of the parties, made June 24, 1974, supplies the answer. The parties stipulated:

> 56. Prior to selecting an employee for promotion to a supervisory position the defendant Company gives the local union an opportunity to make recommendations.
>
> 57. The defendant Company has never had an educational requirement for employees promoted from hourly production jobs to supervisory positions.
>
> 58. Hourly employees of the defendant Company do not have to apply or express their interest in holding a supervisory position in order to be considered for promotion to such a position.
>
> 59. The defendant Company does not have any written guidelines which are used in selecting supervisory personnel.
>
> 60. The selection of supervisors at the Richmond and Virginia Branches of the defendant Company is left to the discretion of those employees at the superintendent and manager levels of plant management.

I would think it obvious that if American permits a union to nominate candidates for promotion, if it imposes no education requirement for employees promoted from hourly production jobs to supervisory positions, if it does not require a showing of employee interest as a condition of promotion and if it has no written guidelines for selecting supervisory personnel, relying instead on the unbridled discretion of higher supervisory personnel, there is no requirement that

employees hired for supervisory positions possess skills or special qualifications not commonly possessed or readily acquired. Even if, as the majority speculates, the district court simply assumed the appropriateness of using general population and general work force statistics as the base data for comparison with American's employment of blacks and women in supervisory positions, that assumption was manifestly correct. Irrespective of whether the district court in its original decision or in its decision on remand articulated the reason for its result with the legal nicety that the majority would prefer, I see no point in returning the case.

It should be remembered also that, while the district court was reconsidering its decision on remand, *Hazelwood* had been decided. Our direction to the district court gave American full opportunity to tender proof of the special qualifications which it believed that it was necessary that its supervisory personnel possess.[1] American failed to offer any evidence other than that already contained in the record. Instead it stated to the district court both in writing and in the oral statements of counsel that the present record was sufficient and the issue to be decided was purely legal. Moreover, before us, American relies on SMSA statistics which have little relevance to the tobacco industry; namely, statistics derived from construction craftsmen, mechanics and repairmen, machinists, metal craftsmen, and other craftsmen. Thus from lack of proof of the need for special qualifications, despite an opportunity to offer such proof, and general inappropriateness of the statistical data asserted to

[1] The actual sequence of what transpired was that after we decided Patterson II defendants moved us to recall the mandate and to reconsider our decision in the light of, *inter alia*, *Hazelwood*. In denying the motion, we stated in our order that "[t]he parties may present Court cases . . . and they may offer such supplementary evidence as to the district court all questions of law arising out of recent Supreme may be pertinent . . ."

support American's position, I would conclude that the only relevant evidence on the factor in question is the stipulation of the parties which, as I have shown, established that special qualifications are not required. Since there was no necessity of special qualifications, the correctness of the district court's factual determinations is unimpeached and there is no need for a second remand.

II

I also see no need to remand for a consideration of post-Act employment decisions for, as I view the record, under any test plaintiffs' prima facie case was not rebutted.

During the post-Act period to the date of trial, American hired or promoted approximately 85 persons to supervisory positions at the Virginia and Richmond branches, 55 at Virginia and 30 at Richmond.[2] Of this number, 34% (27) were promoted and the rest were hired from the outside. At the Virginia branch, 6 of the 55 supervisory appointments were of blacks—10.8% of the total supervisory appointments. At the Richmond branch, 3 out of 30 supervisory appointments were of blacks—10% of the total supervisory appointments. Both of these figures are below the percentage of blacks in even the Richmond SMSA supervisory workforce (12%), and more markedly so with respect to the proportion of blacks in the overall workforce (23.6%).[3]

[2] The majority in banc opinion refers to the number as being approximately 30 in number. Presumably this statement is based upon the district court's finding that "at least" 18 and 9 persons were hired or promoted to supervisory positions at the Virginia and Richmond branches, respectively. But the district court in later findings found that from January 1, 1963 to June 1, 1973 there have been over 55 and 30 vacancies in the assistant foreman position at the Virginia and Richmond branches, respectively, and since 1966, 4 vacancies in the position of supervisor in the Richmond office.

[3] For the reasons set forth in Part I of this opinion, I would deem as the appropriate measure the proportion of blacks in the overall work force (23.6%).

Thus, to me, the evidence of post-Act hirings and promotions to supervisory positions confirms and does not rebut the plaintiff's prima facie case of racial discrimination in post-Act recruitment of supervisory personnel.

There is further support for this conclusion in an analysis of the appointment dates of the black supervisors. Of the 9 black supervisors at the Richmond and Virginia branches at the date of trial, 5 were not made supervisors until *after* January 3, 1969, when EEOC charges were filed. Since one black supervisor had been appointed prior the effective date of Title VII, this means that American voluntarily appointed only 3 black supervisors during the period that its compliance with the law is to be measured.

III

In the light of my views, it could be asked why I do not join in the majority in banc opinion since I agree that remand under *Teamsters* is required and the record is such that plaintiffs will prevail on both issues on remand under *Hazelwood*. The short answer is that this litigation has proceeded at a regrettably slow pace to date. The ultimate relief to those of the plaintiffs entitled to back wages has long been denied. Conversely American has been afforded a full and fair opportunity to show how *Hazelwood* should change the course of this litigation and it has failed or been unable to meet the burden resting on it. I do not think that the ultimate decision in this case on any issue should be delayed any longer than is absolutely necessary. Since I see no viable issue under *Hazelwood*, I would not complicate the remand by interjecting this issue.

Judge Butzner authorizes me to state that he joins in this opinion.

En Banc Opinion of the Court of Appeals ("Patterson III")

WIDENER, Circuit Judge, concurring and dissenting:

I

I concur in the result reached by the majority in part II-B of its opinion, as well as in part IV thereof.

II

As to part III of the majority opinion concerning the application of *Evans*, I respectfully dissent for the reasons I have stated in my dissenting opinion at 586 F2d page 310.

III

I respectfully dissent to part II-A of the majority opinion for the reasons I will set out below.[1]

The lynchpin of the majority's holding, that § 703(h) has no application, is this statement found on page 10 of the slip opinion:

> "This policy [lines of progression] was not in effect at American in 1965 when Title VII went into effect, but was only adopted in January 1968 in connection with American's general revision of its promotional policies, 555 F.2d at 263."

---

[1] I would not find it either necessary or appropriate to make the majority's holding that § 703(h) only applies to seniority systems in existence on the effective date of the Act, although I note that the statutory language and legislative history do not require this holding. The Supreme Court has specifically noted in *Teamsters* that § 703(h) on its face immunizes all bona fide seniority systems. 431 U.S. 348, n. 30. Although § 703(h) is written as an exception and not as a grandfather clause, the majority simply transforms an ordinary exception into just that. Congress undoubtedly knows how to write a grandfather clause if it wishes, but in this case wrote an exception instead. New plants, for instance, are summarily excluded from § 703(h) in the majority view, without stated justification.

I have read page 263 of that opinion from beginning to end, and, with respect, cannot read into it the meaning given by the majority which I have just quoted. Indeed, that opinion indicates, if anything, the lines of progression were in existence at least as early as 1963. 535 F2d at 271. I think the source of the majority's statement is more likely an uncritical acceptance and erroneous interpretation of stipulation 38 filed in the district court, to which I will later allude. In all events, without the accuracy of the quoted statement, the opinion of the majority, that § 703(h) has no application, is without foundation. I think the record is uncontradicted and compelling that the factual statement is demonstrably wrong.

In this case, the pretrial discovery, the trial, and the district court's decision all occurred prior to the Supreme Court's decision in *Teamsters*. Therefore, it was not material whether or not the lines of progression existed prior to 1965 (the effective date of the Act). It is thus not surprising that the district court's findings of fact do not address this issue directly and can be read in two ways.[3] The majority today

---

[3] The district court's stipulation 38 states that a posting and bidding system was instituted in 1968, and that there were exceptions for nine named lines of progression. It does not state whether the lines already existed in 1968 or whether the lines were created in 1968. In light of the full record, the former interpretation is clearly correct. The stipulation reads in full:

> 38. On January 15, 1968, the defendant Company instituted a system (which is still in effect) whereby permanent vacancies in classifications under the jurisdiction of Local 182 of the T.W.I.U. at both the Richmond and Virginia Branches were filled through job posting and employee bidding. Under this system, all such vacancies are posted on plant bulletin boards for seven working days. Anyone in the bargaining unit may sign any posting (bid on any job) with the exception of postings for vacancies in the adjuster, learner adjuster, examiner-making, examiner-packing, and dryer operator, textile dryer operator, overhaul adjuster-making or packing, and turbine operators

simply assumes the lines of progression were created in 1968. Not only is this assumption not correct, but the full record clearly demonstrates that in 1968 lines of progression were *eliminated*, except for the nine lines at issue here which already existed and which were merely acknowledged as pre-existing exceptions to the posting and bidding system. On remand, the district court should if necessary take additional evidence, and in all events issue findings of fact on the origins of the lines of progression.

The full record, even as it now stands, is replete with evidence that the lines of progression existed for many years prior to the effective date of the Act.[8] The Company did not, and still does not, use the terminology "lines of progression." The Company does use the term "qualifications" to describe what are in fact lines of progression; that is, one became "qualified" for a job at the top of the line by first holding a job nearer the bottom of the line. The district court found as a fact that both prior to and after the effective date of the Act, job qualifications "referred to whether or not an employee had filled a particular job before and was in the opinion of supervisory personnel, familiar with it." Finding of Fact Number 8. (Appendix II 8 EPD, ¶ 9722, p. 6012, E.D. Va. 1974.)

Of plaintiffs' First Interrogatories to Defendant American Tobacco Company, interrogatory number 7 calls for an explanation of "the basis or rationale for each line of progression . . . and each change therein described in answer to

---

classifications at the Virginia Branch and adjuster and learner adjuster at the Richmond Branch.

What this opinion refers to as stipulation 38 is actually paragraph 38 of stipulation 1. Other numbered stipulations referred to are the numbered paragraphs of stipulation 1.

[8] A search of the 52 volume record reveals no evidence to the contrary.

interrogatory 6. . . ." (Record, v. I, p. 47, 50-51.) The answer refers to a list of jobs "with qualifications other than seniority." The answer goes on to explain:

> This means simply that an individual has to bid for, and qualify on, the lower paid job first in each case before that person may bid for, and qualify on, the higher paid job. The criterion for requiring these "qualifications" is based squarely on the necessity of learning the first job before being able to adequately perform the next one even after the regular training period.
> (Record, v. I, p. 287.)

The list of jobs referred to (which became Plaintiffs' Exhibit 35M) is titled "EXPLANATIONS OF CLASSIFICATIONS WITH QUALIFICATIONS OTHER THAN SENIORITY IN ANSWER TO QUESTION 7." The list then describes each line of progression (Learner Adjuster to Adjuster, Operator to Learner Adjuster, Catcher to Examiner-Making, etc.) and gives a detailed explanation of the rationale for each one. It is beyond question that the Company used "qualifications" as a synonym for lines of progression.

Interrogatory 6, referred to in interrogatory 7 (see *supra*), reads in relevant part:

> 6. Describe in detail all changes in the composition or structure of departments and lines of progression, or in any job, including the creation, elimination, merger, or restructuring of any department, line of progression or job which occurred between January 1, 1960 and the date these interrogatories are answered.
> (Record, v. I, p. 50.)

American's answer was dated July 26, 1973:

> 6. The significant changes in departments patterns of movement (sic), etc., which have taken place since January 1, 1960, are as follows:

En Banc Opinion of the Court of Appeals ("Patterson III")

* * *

(b) *The elimination of qualifications* (except as noted in answer to question 5) with the establishment of seniority as the sole criterion for permanent promotion to be effected through the posting and bidding system in the contract of 1968 as agreed between the company and the Union.

(c) . . . By 1968 the Company and the Union negotiated *the elimination of qualifications* except in the few jobs mentioned in answer to Question 5.

(Record, v. I, p. 269-270)[4] (italics added).

---

[4] Similar interrogatories were put to the defendant unions. The local and the international provided separate answers, all of which are not illuminating. Plaintiffs' First Interrogatories to Defendant Unions, (Record, v. I, p. 30), includes interrogatory 23 (*Id.* p. 37):

> 23. State whether American Tobacco and defendant have entered into any agreements which in any way altered, restructured, rearranged or merged the lines of progression in any of the departments or units utilized by the Company for organizing its employees by jobs performed. If so, . . . [state] the dates of the agreements.

Defendant Local No. 182's Answers to Plaintiffs' First Interrogatories (Record, v. I, p. 95, 98) states:

> 23. See attached copies of contracts. Chief negotiators for both sides shown in back of attached contracts. Dates of agreements also shown. Dates of negotiations not known.

The Defendant Tobacco Workers International Union's answer simply states that "International has not entered into any agreement with The American Tobacco Company." (Record, v. I, p. 100, 107). *Every union contract in the record, covering the period from 1960 through 1974, states that promotions are based on seniority and qualifications. None of the contracts mention "lines of progression."* See Plaintiffs Exhibit 35FF and page 9 infra.

Plaintiffs' First Interrogatories to Defendant American Tobacco Company, interrogatory 5 (Record v. I, p. 47, 49), is: "State whether jobs in the plant are organized or grouped in any way into departments and/or lines of progression." The Company's answer, in relevant part, is: "There are a few jobs with qualifications other than seniority under the 'posting and bidding' system and these are listed in the attached 1968 agreement between Management and the three Eastern Locals (182, 183, and 192 of the TWIU)." (Record v. I, p. 285). Notwithstanding what the answer claims, the 1968 agreement does not mention lines of progression or the particular jobs involved, and neither does any of the other union contracts.

Since the answer describes the reduction in the number of lines of progression which occurred in 1968 but does not indicate the creation of any lines, the lines existed on and before January 1, 1960. The lines of progression were not created in 1968, as the majority assumes; they were eliminated in 1968, with the exception of the few at issue here. These few existed well before the effective date of the Act, and were not eliminated in 1968 when the rest were.

The Company provided two sets of answers to each interrogatory, one for the Richmond Branch and one for the Virginia Branch. The answer to interrogatory 6 quoted above is for the Richmond Branch. The answer for the Virginia Branch contains a paragraph identical to paragraph (b) quoted above, and also adds:

> By *1967*, the pattern of downward movement, principally of whites, had slowed somewhat, a few new hires were taken in, some whites elected voluntary layoff status rather than do some of the pipeline jobs, and *the Company and the Union negotiated the elimination of qualifications* except in those few jobs mentioned in answer to question 5.
> (Record, v. I, p. 287) (italics added).

The Answer to interrogatory 7 quoted above is for the Virginia Branch. The Richmond Branch answer reads: "7. Refer to Virginia Branch answers, same information is applicable. (Note only classifications of Adjusters and Learner Adjusters apply to Richmond Branch.)" (Record v. I, p. 270).[5] Lines of Progression were in existence prior

[5] The EEOC put similar interrogatories to the Company, and received similar answers. See EEOC Interrogatories 1-20 to Defendant American Brands, Inc., d/b/a The American Tobacco Company, interrogatories 8 and 16 (Record, v. I, p. 195, 201, 203-204) and the Company's answers (Record, v. I, p. 315, 318, 321-324 (Richmond Branch). and p. 327, 332, 336-338 (Virginia Branch)).

to 1960, and all but the nine[6] at issue here were eliminated by 1968.[7]

It is more than merely interesting to recognize that the named plaintiff, John Patterson, filed his charge not because he would not enter a line of progression as may be inferred from the various majority opinions filed in this case but because the line of progression that he was in was *eliminated* in 1968. Although a description of his line of progression, like the others, was not formally reduced to writing, Patterson and everyone else knew about it, relied on it, and Patterson was understandably upset when it was eliminated. Patterson had been a factory supply handler, and there had been a line of progression from that position to the position of machine operator. Supply handlers were trained to be operators, and part of their job as supply handler was to relieve the operator. In this manner handlers gained one or two hours of experience a day as operators. (Record, v. XVII, pp. 68-73, 105-106, 118; v. XXV, p. 56; v. XVIII, p. 57D; v. XIX, p. 4-5 (deposition of foreman Barnes); v. XXXVIII, p. 18 (deposition of employee Howard); v. XXXIV, pp. 43-44, 53-59-60 (deposition of Foreman Thomas); v. V, pp. 135-136 (Trial Transcript); v. VII, pp. 627-631 (Trial Transcript)). Patterson gave the following testimony at his deposition:

---

[6] Since the district court found that three of the lines were justified by business necessity (see Finding # 31, EPD p. 6013), only six lines are actually at issue. However, because all nine lines pre-date the Act, they are all, if bona fide, protected by § 703(h), whether or not they are justified by business necessity.

[7] American's answers to plaintiffs' first set of interrogatories contain numerous other references to the existence of "qualifications" *prior to 1968* and to the elimination or reduction in the number of lines of progression in 1968. See, e.g., answers to interrogatories 20, 25, 26, 28, 29 (Record, v. I, pp. 294, 296, 298, 299, 300).

Q. Did you file a charge of discrimination with the EEOC?
A. Yes.
Q. I believe it was in 1968. Can you recall the specific charge that you made at that time?
A. Yes.
Q. What was that?
A. Well, the charge was that they had—you want me to go into detail on it?
Q. Be fine.
A. Well, I had put in my time for my hours of receiving a machine, which was supposed to be nine hundred hours, and in the meantime after we put in that nine hundred hours they gave out some machines, but they dipped back across from the agreement they made. They changed the agreement.
Q. Was this in 1968?
A. In '68.

* * *

Q. Do you recall the employees who got those promotions following the posting?
A. No, I don't recall that either.
Q. If I told you they were James Starkes, Isaiah Jones, Milton Branch and Andrew Yancey, would that refresh your memory?
A. Well, that seems like the four that were brought over after we had served our nine hundred hours. I say that seemed like the four.
Q. And they were all senior employees to you, were they not?
A. Yes, they were senior.
Q. And they were all black employees, were they not?
A. Yes.

* * *

Q. Now, as I understand it, the only claim of discrimination that you made so far as your testimony in response to Mr. Wickham's question is that you had accumulated 900 hours on the machine, is that correct?

A. Right.
Q. And that you didn't get a job as a machine operator, is that right?
A. Right.
Q. There was no other claim of discrimination that you are making?
A. Not for me.

* * *

Q. Who discriminated against you?
A. From what I understand, they changed the rule in the middle of the stream and I got hurt.

* * *

Q. How did they change the rule?
A. Well, from the way I look at it, they changed the rule when they reached over and got those four men and put them into jobs like that and left the other men that had accumulated the hours with the less seniority outside.
Q. Those four men were black men, weren't they?
A. Yes.
Q. This is what you mean when you say you were discriminated against?
A. Yes.
(Record, v. XXV, pp. 20-21, 23, 36, 27.)

Mr. Dillard (manager), in his trial testimony, confirmed that this was the basis of Patterson's charge. (Record, v. VIII, pp. 982-982, 1035.) The *elimination* of this line of progression in 1968 (from factory supply handler to machine operator) formed the basis of Patterson's charge. Patterson was in a line of progression, but when this line was eliminated and replaced with a posting and bidding system, others with more seniority got the vacancies.

Taylor, another named plaintiff, also filed a charge with the EEOC, alleging that his seniority rights were violated. His complaint is identical to Patterson's. He had acquired 900 hours' experience as an operator, but when that line

of progression was eliminated in 1968, four other blacks with more seniority got the position(s) he wanted. (Record v. XXV, pp. 72-82 (Taylor's deposition); v. XXXVIII, pp. 7-11, 18 (deposition of Howard, a black Union officer who has been with American since 1946): v. VIII, pp. 982-984, 1035 (Dillard's trial testimony)).

Every contract between American and the relevant locals of the Tobacco Workers' International Union clearly recognized that for some promotions, "qualifications" were necessary. Article 8 of the Union contract, for example, signed on November 4, 1959 (effective January 1, 1960) contains the following:

> All promotions and demotions shall be made in accordance with seniority *provided that,* in the opinion of the Management, *there is no question as to the qualifications* and efficiency of the employee concerned. (Italics added)

Identical or very similar clauses were included in every contract since then (no earlier contracts appear to be in the record). (See Record, v. XIV, Plaintiffs' Exhibit 35FF, Union Contracts effective January 1, 1962 (including amendment of Oct. 27, 1964); January 1, 1965; January 15, 1968; January 15, 1971.) These contracts, interpreted in light of the district court's finding on the meaning of "qualifications," show that at least since 1960, a promotion to certain jobs depended on whether or not the candidate "had filled a particular job before." This describes the essence of a job line of progression. Indeed, we so described it in the first panel opinion in nearly the same words. 535 F2d at 265. The 1968 and 1971 union contracts continued to use the terminology "qualifications." They did not use the phrase "lines of progression," nor did they identify which jobs are in lines of progression.

Plaintiffs' Exhibit #56 indicates which jobs, at the Virginia Branch, required "qualifications" in 1963 if not earlier. The exhibit lists 82 job classifications in which, as of September 1963, vacancies were filled by "the same system of filling vacancies (promotions) as the Richmond Branch, i. e., no qualifications, plantwide seniority only." That list of 82 jobs does not include any of the nine jobs at issue here (adjuster, learner adjuster, examiner-making, examiner-packing, ADT dryer operator, textile dryer operator, overhaul adjuster, adjuster-prefabrication, and turbine operator). The sentence immediately following that list reads:

> From September 16, 1963 to January 15, 1968 promotions to the remaining job classifications at Virginia Branch required plant-wide seniority and qualifications, with "qualifications" prevailing over seniority.

This clearly shows that at least as early as 1963, in order for an employee to get promoted to one of the nine jobs at issue here (as well as others), the employee had to have filled a particular job before. Lines of progression existed at least as early as September 16, 1963. See also Record, v. V, pp. 84-87.

The record is replete with evidence that as far back as the 1950's, for the jobs at issue here and for others, an employee had to work in the lower paying job before being promoted to the higher paying job. One of the nine lines that was recognized as an exception to the posting and bidding system is the line from catcher to examiner (Stipulations 38, 41). The deposition of S. Kirby, who started with American in 1952 as an Assistant Foreman, shows the following:

> Q. During that period of time [from 1952 to 1957], what type of qualifications did you have to have to

become an examiner?
A. You would have to be an experienced catcher.
(Record, v. XVI, p. 28-29; see also *Id.*, p. 52.)

The deposition of John Dillard, Manager (Record, v. XVII, p. 95), includes his statement that "To my knowledge, all of our examiners in the Making Department, at one time or another have been a catcher." Thus, the line of progression from catcher to examiner existed in the 1950's and was not "adopted" in 1968.

The progression from operator to learner adjuster was also excepted from the general posting and bidding system. (Stipulations 38 and 40, 8 EPD at p. 6010.) John Dillard started with American in 1940 as a factory clerk and worked his way up to become Manager in 1961(which position he still held in 1973, the date of his deposition). (Record, v. XVII, pp. 4-6.) Dillard's deposition contains the following:

Q. To your knowledge, have there *ever* been any learner adjusters who haven't been operators?
A. To my knowledge, all of our learner adjusters have come from the operating classification.
(Record, v. XVII, p. 94, emphasis added.)

E. B. Barnes started with American Tobacco in 1943 as a hopper filler and tote boy, and worked his way up to become foreman by the time his deposition was taken. (Record, v. XX, pp. 3-5.) The following exchange took place at Barnes' deposition:

Q. In order for a guy to be an adjuster, would it be an advantage for him to be a maker or packer operator?
A. Oh, definitely, yes, definitely. It is almost a must. You put somebody on there to make an adjuster out of him, it would be like trying to take me and

make me an engineer without giving me an education.

Q. Do you know of any situations since you have been there where a making adjuster is put to work without being an operator first?

A. I don't recall any. I don't know of any. I don't know of any.

Q. Is there any rule that says you have to be one?

A. I think this is one of the things that goes on the posting notice when they post, to say the qualifications are that you are an operator. If it was making adjuster, that you were a making operator, etc.

(Record, v. XX, pp. 84-85.)

While the Virginia Branch had nine lines of progression, the Richmond Branch had lines leading to only two positions, learner adjuster and adjuster. (Stipulation 38, *supra.*) W. F. Miller, assistant manager of the Richmond Branch, testified at trial as follows:

Q. Now, under that departmental seniority, were there any other qualifications [f]or promotions during that period, other than seniority, departmental?

A. This was still prior to—

Q. Prior to 1963?

A. No, sir. The only qualifications were people that were interested and could learn the job. Other than we had one of our qualifications on the line of the progress.

Q. The line of progression?

A. The line of progression; that you had to be a packing machine operator before you became a learner adjuster.

Q. And a learner adjuster before you became an adjuster?

A. Yes.

Q. That line of progression is still in effect?

A. Yes, it is.

Q. And it has been even since prior to the merger?
A. Yes, sir.
(Record, v. VII, Trial Transcript, pp. 868-869. The merger referred to is obviously the merger of the two union locals which took place on September 16, 1963.)

H. Nuckols, Jr. was Machine Shop Foreman from 1955 to 1969. He also testified at trial:

Q. And what are the qualifications for becoming a learner adjuster?
A. The basic qualification is that he have been a operator, machine operator, a packer, or making machine operator.
Q. Why is this necessary?
A. Well, I would think it would be necessary in order that he would become somewhat familiar with the machine. *That is just one of the regulations they have had down through the times that they have always used.* . . .
Q. Now, sir, in order to become an adjuster, is it correct to say that you must serve as a learner adjuster first?
A. Yes.
(Record, v. V, Trial Transcript, pp. 241-242; italics added.)

Nuckols further testified that to his knowledge, every adjuster and learner adjuster has served as either a packing or making machine operator (*Id.* at 244) and that this requirement was a prerequisite (*Id.* at 267).

G. A. Howard started with American in 1946 as a general laborer, and was a learner adjuster when his deposition was taken. He confirmed that prior to 1968 the "qualification[. . .]" for learner adjuster was to have been an operator. (Record, v. XXXVIII, p. 19.) Foreman O'Brien, in his deposition, also confirmed that prior to 1968 adjusters

were first operators. (Record, v. XIX, p. 38.)

Indeed, at least as early as 1963, the required qualification for "progressing" from operator to learner adjuster to adjuster existed and was used to fill even temporary vacancies. Referring to the period from 1963 to 1968, Dillard gave the following testimony at trial:

> Q. What about your adjusters? Were they handled in the same way as your machine operators?
> A. The adjusters *followed a progression that led to the job*. They had previously been an operator—
> Q. I am only talking about temporary vacancies now.
> A. Yes. I am telling you about temporary vacancies. They had been an operator, and then they had been a learner adjuster, and then they had been an adjuster.
> Q. And you filled the temporary vacancy in one of those jobs by getting someone who had previously done the job?
> A. We had a list of people, and the list was set up by seniority and qualifications, and we used the list.
> (Record, v. V, Trial Transcript, pp. 122-123.)

The EEOC, in its Post-Trial Brief, states that "qualifications" were used in the canvassing method of filling temporary vacancies "From 1963 to 1968." EEOC's Post-Trial Brief at 35 (Aug. 7, 1974). It is clear from the uncontradicted testimony at trial and in depositions introduced into evidence that the line of progression from operator to learner adjuster existed for many years prior to 1968, and prior to the effective date of Title VII.

The same is true of the progression from learner adjuster to adjuster. This line was also recognized as an exception to the posting and bidding procedure. (Stipulations 38, 39, 8 EPD at p. 6010.) Dillard's deposition includes the following:

Q. Have there *ever* been any adjusters who haven't been learner adjusters?

A. I don't positively know the answer to that question. In recent years I know that—and when I say recent years, I mean *in the last twenty-five years or so—all of the adjusters have come from the learner adjuster grouping.*

. . . .

(Record, v. XVII, p. 94, emphasis added.)

Employee Kirby's deposition includes:

Q. During that period of time from '57 to '62, again, how did someone become an adjuster?

A. Someone would have become a learner adjuster before he would have become an adjuster.

(Record, v. XVI, p. 42.)

Miller's trial testimony, quoted *supra*, confirms that prior to 1963 one had to be a learner adjuster before becoming an adjuster. Nuckols' trial testimony, also quoted *supra*, provides further confirmation that the line of progression from learner adjuster to adjuster existed well prior to the effective date of Title VII.

Indeed, the plaintiffs argued that the "qualification" of being a learner adjuster before becoming an adjuster has "always" existed. The Plaintiffs' Memorandum in Opposition to Defendants' Motion to Amend and Supplement Findings of Fact and Conclusions of Law (Record, v. IV, p. 211) includes the following response to the defendants' proposed Supplemental Finding #5:[8]

---

[8] American Tobacco's Motion to Amend and Supplemental Findings of Fact and Conclusions of Law and to Proffer Additional Evidence (Record, v. IV, p. 130) includes Proposed Supplemental Finding of Fact #5;

5. Both the Richmond and Virginia Branches established plant-wide seniority in 1963. The Richmond Branch has never used prior experience on a job as a prerequisite to a promotion to any job under the jurisdiction of TWIU Local 182. The Vir-

> 5. Supplemental Finding #5 is adequately covered in the Court's Finding #8. The Company's suggested supplement is incorrect, e.g. *the Richmond Branch has always required its TWIU "adjusters" to hold the position of "learner adjuster."* In addition the Virginia Branch maintained "lines of progression" as recently as the date of trial. (Stipulations Nos. 39-47.) (*Id.*, emphasis added.)

Here, then, even the plaintiffs allege that the learner adjuster-adjuster line of progression "has always" existed at the Richmond Branch.[9]

The posting and bidding system instituted in 1968 also recognized an exception for the progression from line searcher to examiner-packing. (Stipulations 38 and 42, 8 EPD, p. 6010.) The Dillard deposition includes:

> Q. All right, sir. It is my understanding, also, that in order to become an examiner in Packing, you should have been a line searcher, is that correct?
> A. Yes, sir, that is correct.
> * * *
> Q. Have there ever been any examiners who haven't been line —
> A. I am not really sure of this one. I know that we have not had any examiners that haven't been line [searchers] at some time in recent years.

(Record, v. XVII, p. 96; by "recent years" he means within the last 25 years, *Id*, p. 94.)

The Dillard deposition also indicates that the boiler operator to turbine operator line of progression has existed

---

ginia Branch used "qualifications" (prior experience) in certain classifications until January 15, 1968.
(Stipulation #38 directly contradicts the second sentence of the proposed finding.)

[9] The Court denied defendants' motion to amend and supplement. Record, v. IV, p. 267.

for at least fifteen or twenty years. (Record, v. XVII, pp. 100-101; see Stipulations 38 and 47, 8 EPD, p. 6010.)

Finally, even the EEOC claims that "qualifications" were used, not *after* 1968, but "until 1968." Plaintiff-Equal Employment Opportunity Commission's Post-Trial Brief at 33. Plaintiffs, John Patterson, et al, agree. In their separate post-trial brief, they claim that qualifications were part of "The American Tobacco Company's Promotional Systems Which Were In Effect *Prior to January 15, 1968.*" Post Trial Brief of Plaintiffs John Patterson, et al, at 62 (emphasis added). Indeed, that brief at that page indicates the system of "qualifications" was instituted "[f]ollowing the merger . . . on September 16, 1963. . . ," as does the EEOC brief quoted last above. The only reasonable meaning to "following" is just following.

IV

It is acknowledged that the majority holding as to the effect of § 703(h) on the lines of progression within the seniority system is based entirely on the fact that the lines did not exist in 1965. I maintain this fact is simply not in the record.

Because the question of exactly when the lines of progression were initiated is so important in this case and was never made such an issue of in the district court or in the previous hearings in this court, I am of opinion the remand order should include a direction to inquire into the lines of progression to ascertain when and under what circumstances they came into being.

I doubt that it is fair to the plaintiffs to decide the question on the record before us now, but should we so do, the record is uncontradicted that the lines of progression came into being at the very latest just following the merger

of the two unions in 1963, almost two years before the effective date of the statute.

Should such an inquiry disclose that which the record tends to show, that the lines of progression were instituted prior to the effective date of the statute, then the district court should further inquire as to their bona fides.

V

Footnote 4 of the majority opinion, in refutation of the facts disclosed by this dissent, I find, with all respect, equally as unsupported by the record as is the body of the opinion.

There follows an analysis of the footnote, albeit somewhat out of the same order in which the footnote is written:

A.

The footnote ends with the conclusion that, "within contemplation of § 703(h), the job line of progression policy here in question only came into existence in 1968," and, as a part of its authority for that conclusion, states that "a panel of this court has long since assumed" that fact. A principal problem with this case for some time has been the assumption of facts rather than their finding from the record. See, for example, my previous dissent at 586 F2d 305, 306 concerning the promotion of supervisory employees, which required a similar factual analysis. The majority here, I suggest, assumes the same fact it says the panel assumed. Assumption of facts, especially critical contentious facts, is not an acceptable way to reach a decision, I think. Rather, resort to the record is required.

While I acknowledge an "exhaustive search of the evidentiary record," I must confess to disappointment because there was no "exhaustive counter-analysis of the factual record." I suggest that a counter-analysis would not have

supported the critical fact on which the majority bases its opinion.

B.

The position the majority takes in its footnote 4 is in reality twofold.

First, to support its conclusion that the lines of progression were only adopted in January 1968, it concedes that there were "informal rudiments" of such before 1965. Such informal rudiments, however, according to the majority, were replaced in 1968 by "stated procedures adopted by American in 1968 to control entry into and promotions within specifically identified job 'lines' ".

This conclusion of the majority, I think, is not only unsupported by the record, it is entirely refuted by the record.

Both the January 1965 and the 1968 collective bargaining agreements in their only references to lines of progression state *in haec verba*:

> "All promotions and demotions shall be made in accordance with seniority except as otherwise agreed to by the Company and the appropriate Union local or locals, provided these promotions and demotions shall be made without regard to race, color, creed, sex, or national origin, and provided that, in the opinion of Management, there is no question as to the qualifications and efficiency of the employee concerned."

We must remember that "lines of progression" was not a part of the parlance of the employee, the employer, or the union until this claim became contentious. The parties all referred to job qualifications, as does the collective bargaining agreement. So, the "stated procedures" relied upon by the majority as coming into existence in 1968 in fact were in existence at least as early as January 1965. And not only were they in existence, they were letter for letter the same.

The above quotation from footnote 4 next provides that the job lines involved were "specifically identified." The use of "specifically identified" as used by the majority may easily have two meanings. One of the meanings is that the job lines were "specifically identified" in 1968 but had not been before. The other is that while the job lines had been "specifically identified" before, they were governed only by "stated procedures" beginning in 1968. Neither meaning is supported by the record. Neither the collective bargaining agreement of 1965 nor the collective bargaining agreement of 1968 has any job line which is "specifically identified." As I have heretofore pointed out, the number of job lines of progression was reduced in 1968. But, other than a reduction in numbers, the job lines of progression remained the same. The identity of the job lines of progression involved was known to everyone both before and after the 1968 agreement, as were the qualifications to benefit by one of those lines.

Footnote 4 goes on to say that within the specifically identified job lines of progression, "enough of change and formalization" took place in 1968 "to constitute a new policy, or at least one so radically altered from prior unstructured procedures" that it could not be considered a routine continuation of the old policy. I take issue with this fact finding also, and note it was not made by the district court but by this court.

That there was no "change" in the lines of progression policy by the collective bargaining agreements is clearly shown by the language of those agreements I have quoted above. The majority opinion then suggests that there was not only "change" but also "formalization" which had not existed before. By "formalization" the majority opinion may only suggest that that which theretofore had been informal

was made formal in 1968. The short answer is that the policy was formal both in 1965 and in 1968, as is again shown by the collective bargaining agreements. What could be more formal than a written contract between the company and the union? I suggest that nothing could. And I note that the majority does not demonstrate by jot or tittle how anything became formal in 1968 which theretofore had been informal. While it finds that there was a "new policy" commencing in 1968, it fails to tell us what the old policy was. Indeed, this would also seem to be impossible in view of the letter for letter repetition of the 1965 provision in the 1968 contract. The remarks just above also apply to the majority's finding that if the policy was not new, it was "at least one so radically altered" that it could not be considered simply a routine continuation of old policy. What the policy was before alteration is also not explained in the majority opinion, and, for the same reasons I have outlined above, I suggest it is impossible to explain because there was no difference.

The majority relies on *Teamsters*, 431 U.S. at 352, for its legal conclusion that the policy it finds as either *"new"* or "so radically altered" is not "simply a 'routine application' " of "those pre1965 procedures." It emphasizes that it construes § 703(h) as a "quite narrow exception" to Title VII's general coverage of conditions of employment, and again emphasizes that it considers the "routine application" of pre-1965 policies should be "given a stringent reading against any employer seeking the special insulation provided by § 703(h) for any seniority 'system' alleged to have been in place when Title VII was enacted." "On that basis," in the majority's words, it carries its "stringent reading against any employer seeking special insulation provided by § 703(h)" into fact finding, for the concluding sentence of

the fact finding, "on that basis," is that the lines of progression only came into existence in 1968. I do not think that *Teamsters*, or any construction of it, authorizes a "stringent reading" against anyone, employer, employee, or union, with respect to fact finding. I had thought courts must be neutral fact finders.

If it be said that the "stringent reading against any employer" is meant only to refer to whether or not § 703(h) should apply, the majority has carried that "stringent reading" into full force and effect by the result it obtains on account of changes in the lines of progression. The only way the majority can find liability on this record without further fact finding by the district court is by giving such a "stringent reading" against the employer and the union that it actually finds liability when all the employer and the union tried to do was to improve the existing conditions for the plaintiff class, as I will set out below, for it must be remembered that *each relevant change in the collective bargaining agreements disclosed in this record, whether pre- or post-act, has benefited the plaintiff class. None have been to its detriment.*

C.

While the above comments go largely to the majority's lack of factual support by analysis or by supporting testimony or exhibits to support its conclusion, and incidentally to its construction of *Teamsters*, perhaps the most serious error it makes in its efforts to support the key conclusion as to the 1968 establishment of lines of progression is this: It holds that if there is enough change and formalization of the lines of progression policy, "whether *in favor of* or against employee interest," to constitute a new or radically altered policy, then the new policy is not entitled to a § 703(h)

exemption. (Italics added.) "Employee interest" may only be considered the interest of the plaintiffs since that is what this case is all about, and there is no litigation at hand concerning the interest of other employees. Thus, the majority boldly holds that a change in a previously existing seniority system, although the change may be in favor of a class of black employees, will deprive the company and the union making the change from the benefit of a § 703(h) exemption.

Nothing I can think of could be less founded either in law or logic.

In the 1968 contract, for example, there is a provision for posting job openings either superimposed upon the system of lines of progression, or from which nine lines of progression were excepted. (1968 contract p. 4; stipulation 38.) Of course this action, especially when coupled with the elimination of certain lines of progression as took place, would only have had a favorable effect on the black employees as a class, for the cases are too numerous to bear citation, which, in their remedies for racially discriminatory employment practices, provide for posting and bidding. Thus, logic rejects this aspect of the conclusion of the majority.

The law likewise rejects this conclusion in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), in which the holding of the court was that it was not a violation of the 1964 Civil Rights Act for an employer and a union to agree to a preference for minority employees. The court said that the act is "intended as a spur or catalyst to cause employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." 443 U.S. at 204. Thus,

Weber approved actions by employers and unions designed to alleviate previously existing discriminatory conditions of employment. That part of the majority opinion providing that a company and a union cannot alter a seniority system so as to make more favorable the conditions of employment of minority employees is directly contrary to *Weber*, I think. It requires a too strained construction of the statute to hold that a seniority system admittedly discriminatory in effect, as in *Teamsters*, is protected by § 703(h) so long as it remains unchanged, but if it is changed in favor of the minority employees, then the employer and the union lose their § 703(h) exemption.

Not only is this conclusion contrary to logic and law, it is a blow against minority employees and contrary to the purpose of the statute. Hereafter, in this circuit at least, neither an employer nor a union may safely agree to any change in a seniority system existing before July 1, 1965 for fear that its § 703(h) exemption will be lost. Thus, a seniority system as rigid as the one approved in *Teamsters*, which protects a group of white employees, under the provisions of § 703(h), will receive the sanction of the statute and the blessings of this court, while a seniority system equally as rigid but which by the action of the employer and the union has, since July 1, 1965, ameliorated a part of the previously existing discriminatory conditions, will not. Such a conclusion, I suggest may sound astonishing, yet that is precisely what the majority holds.

I am authorized to state that Judge Russell concurs in this opinion.